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## Measuring Transnational Human Rights

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## MEASURING TRANSNATIONAL HUMAN RIGHTS

Cortelyou C. Kenney\*

*Over the past three and a half decades, hundreds of transnational human rights civil suits—i.e., suits seeking monetary compensation for atrocities committed abroad ranging from torture and extrajudicial killing to forced labor and human trafficking—have been filed in the United States. Exhaustive qualitative research chronicles plaintiff “successes” and “failures” as defined by how frequently plaintiffs win, the magnitude of judgments and settlements they obtain, and the extent to which judgments and settlements are enforced. The prevailing wisdom is that while some cases have proven runaway successes along these axes, in general, transnational human rights suits constitute “a modest enterprise akin to personal injury or mass tort suits.”<sup>1</sup> Certain commentators argue that hostility stemming from “foreignness” and reliance on international law is responsible for this underwhelming performance and, in particular, the low win rate in transnational suits.<sup>2</sup> Commentators point to “avoidance doctrines”—such as personal jurisdiction, forum non conveniens, abstention comity, and the presumption against extraterritoriality—perceived as the most common means of shunting transnational cases as evidence of courts’ “isolationism.”<sup>3</sup> Other thinkers take the argument a step further, claiming hostility toward international law portends the demise of human rights in federal courts following the U.S. Supreme Court’s 2013 decision *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*)*

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\* Thomas C. Grey Fellow and Lecturer-in-Law, Stanford Law School, 2014–2015. I would like to thank Roxanna Altholz, Daniel Berman, James Cavallaro, Stephen Herzog, Cathy Hwang, Dmitry Karstedt, Caleb Kenney, James Kenney, Amalia Kessler, Katarina Linos, Jenny Martinez, Norman Spaulding, Beth Van Schaack, Claret Vargas, and participants at the Stanford Fellows Workshops. Finally, to my wonderful colleagues, the Thomas C. Grey Fellows, to fantastic librarians Sergio Stone and George Wilson, and to my research assistants, Jun Feng and Lisa Li, without whom this project would not have been possible. The dataset associated with this Article—which is current through November 12, 2015, the date this Article was sent to press—is publically available on SSRN and the Fordham Law Review website at [http://fordhamlawreview.org/assets/Documents/Kenney\\_December\\_Dataset.xlsx](http://fordhamlawreview.org/assets/Documents/Kenney_December_Dataset.xlsx). Given the sheer size and complexity of the dataset, it is likely that there are some minor coding irregularities. All errors contained therein are my own.

1. Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation As a Tool for Social Change*, 57 VAND. L. REV. 2305, 2317 (2004).

2. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1081, 1088–89 (2015).

3. *Id.*

*that fundamentally changed the landscape against which these suits are litigated. But no scholar to date has undertaken a systematic, quantitative examination of such conclusions to determine whether the numbers actually bear them out.*

*This Article fills that gap. It collects a new dataset of all cases and opinions filed from 1980 to the present under the two predominant human rights civil statutes to scrutinize these claims and lay the groundwork for future quantitative analysis. The data support three findings. First, the transnational human rights enterprise is modest both in terms of how frequently plaintiffs prevail and how much money they are entitled to and actually do obtain, but not as modest as believed. Second, any modesty is not evidence of courts' isolationism. The real doctrines most commonly employed to end civil suits prior to Kiobel II suggest that courts do not use domestic law avoidance mechanisms designed to prevent consideration of, and de facto shun, the application of international law. Rather, courts apply international law, including human rights law, but are conservative in their interpretation of it—protecting only certain types of harms committed by certain types of actors. Third, a core group of claims has weathered significant doctrinal shifts over time. Plaintiffs bringing these claims are poised to circumvent Kiobel II and are on track to be as “successful” or “unsuccessful” as ever.*

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## INTRODUCTION

Over the past three and a half decades, hundreds of transnational human rights civil suits—i.e., suits seeking monetary compensation for atrocities committed abroad ranging from torture and extrajudicial killing to forced labor and human trafficking—have been filed in the United States. Against the backdrop of dictatorships and brutal military regimes in place during the Cold War, human rights practitioners concluded that U.S. courts were the best, or at least the least bad, fora to litigate such abuses because the possibility of providing reparations to human rights victims was vanishingly

small elsewhere. Prominent human rights lawyer turned law professor Beth Stephens summed up the prevailing sentiment:

In a more perfect world, none of these human rights victims would have chosen to file civil lawsuits in the United States. But the combined efforts of international and domestic legal systems offer very little in the way of enforcement or compensation to them or others like them around the world. More importantly, civil litigation in their home countries and criminal prosecution of those responsible are both clearly impossible.<sup>4</sup>

That the United States was better equipped to dispense this form of justice was an assumption not unfounded. Human rights organizations led the charge in the late 1970s and early 1980s, bringing civil suits in the United States as part of a broader strategy to hold abusers accountable that would eventually include pushing for criminal actions in countries such as the United Kingdom, Spain, France, and Belgium.<sup>5</sup> In 1979, the first successful transnational human rights case was filed under a little known part of the U.S. Code called the Alien Tort Statute (ATS), which entitles aliens to civil damages for violations of the law of nations.<sup>6</sup> The family of a young Paraguayan who had been kidnapped, tortured, and killed by his country's dictatorship filed suit in the Eastern District of New York against

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4. Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 486 (2001) (discussing the initial reasons advocates filed in the United States, including both substantive and procedural advantages of the U.S. legal system over those of foreign nations and the fact that the United States had become a haven for many human rights abusers); see also Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CALIF. L. REV. 1495, 1501 (2014) (explaining that current victims seek justice in the United States given a relative lack of corruption); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 149 (2006) (arguing that the United States is a superior forum for human rights victims because victims themselves can initiate individual cases without the buy-in of the government as part of the public law system); Cortelyou Kenney, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CALIF. L. REV. 857, 861–62 n.23, 864 n.31 (2009) (collecting additional sources in support of the continuing, though possibly mistaken, belief that the United States is the strongest forum to litigate human rights claims).

5. Altholz, *supra* note 4, at 1498.

6. *Filártiga v. Peña-Irala*, 630 F.2d 876, 878–80 (2d Cir. 1980). The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2012)).

According to Professor Kenneth Randall, approximately twenty-one ATS cases were filed between the statute's enactment and the *Filártiga* decision, with courts twice finding jurisdiction. Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 & n.15, 5 & n.16 (1985). Of the two cases where courts found jurisdiction, the first failed for lack of evidence to support the violation, see *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), and the second was *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795), in which the court sustained jurisdiction for the ATS but held that a treaty with France altered the outcome of the case, *id.* at 811. There are still other decisions not cited by Professor Randall in which courts found that there was jurisdiction but dismissed the case for other reasons. *E.g.*, *O'Reilly De Camara v. Brooke*, 209 U.S. 45, 50–51 (1908) (dismissing claim for cattle slaughter because defendant was a U.S. actor whose actions were ratified by the U.S. government conferring immunity from suit under the ATS).

the officer allegedly responsible for these acts, then living in Brooklyn.<sup>7</sup> The family had first pressed criminal charges in Paraguay, but the Paraguayan police issued a death threat to their lawyer.<sup>8</sup> In *Filártiga v. Peña-Irala*,<sup>9</sup> the Second Circuit held that the ATS gave U.S. district courts jurisdiction to remedy violations of the law of nations committed abroad against foreign nationals by officials acting “under color of government authority.”<sup>10</sup> After *Filártiga*, the ATS became the most important method of bringing human rights civil suits in the United States and, arguably, the world.<sup>11</sup>

Much ink has been spilt on the “successes” and “failures” of plaintiffs in cases brought under the ATS and other similar statutes, such as the Torture Victim Protection Act of 1991<sup>12</sup> (TVPA). In many senses these cases have been successful: most scholars and practitioners agree that these laws are symbolically and psychologically important because they validate victims’ experiences even when no money damages are awarded.<sup>13</sup> They also point to judgments and settlements ranging from the tens of millions to the billions of dollars obtained in ATS and TVPA cases dealing with torture, forced disappearances, extrajudicial killings, and massacres perpetrated by dictators and their agents. Examples include judgments against Indonesian, Guatemalan, Salvadoran, Argentine, and Chilean generals, the Philippine dictator Ferdinand Marcos, the Haitian dictator Prosper Avril, an Ethiopian official, and the former mayor of Beijing.<sup>14</sup> Plaintiffs also increasingly

7. *Filártiga*, 630 F.2d at 878–80.

8. *Id.* at 879.

9. 630 F.2d 876 (2d. Cir. 1980).

10. *Id.* at 881, 890.

11. Compare HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 33–35 (2008) (arguing that human rights advocates became warriors in the name of violations abroad as civil rights lawyers did in the name of ending segregation and other racially biased policies), with Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 136 (2013) (contrasting ATS litigation with similar litigation in other locations, such as the United Kingdom).

12. The TVPA is an amendment to the ATS that allows suits to be brought not only by aliens but also by U.S. citizens against individuals acting under color of law who commit torture or extrajudicial killing. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

As of June 2014, there were just shy of 4500 law review articles that mentioned the Alien Tort Statute. Altholz, *supra* note 4, at 1500 n.21.

13. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS xvii–xviii (2d ed. 2008) (arguing that even filing suits is often satisfying to plaintiffs where defendants are forced to leave the United States or answer for atrocities and that such actions can promote awareness of human rights abuses). Professor Koh enumerates five “successes” of transnational suits: “compensation of victims; denial of safe haven to the defendant in the judgment-rendering forum; deterrence of others who might contemplate similar conduct; and enunciation of legal norms opposing the conduct for which the defendant has been found liable.” KOH, *supra* note 11, at 25–26 (emphasis omitted). Professor Koh lists an additional, final objective: “revision of illegal government policies.” *Id.* at 26. But see Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1467 (2014) (characterizing ATS cases as having “modest practical import”).

14. STEPHENS ET AL., *supra* note 13, at 13–14 (collecting cases).

bring transnational human rights civil suits against corporations.<sup>15</sup> While no court has upheld a jury verdict against a corporate defendant, expensive settlements combined with even more expensive attorneys' fees exert pressure on defendants to modify their behavior to avoid payouts or the potential publicity nightmare that might ensue.<sup>16</sup>

Yet even the most ardent supporters of transnational human rights suits concede that "the direct economic benefit to individual plaintiffs has been limited[] [and] [f]ew ATS plaintiffs have received monetary compensation from their perpetrators."<sup>17</sup> One prominent human rights litigator turned law professor has noted that, in terms of financial payouts, ATS litigation may be seen as a "modest enterprise, akin to personal injury or mass tort suits"<sup>18</sup>—a somewhat pessimistic outlook given that many of the most important mass tort cases have "failed, at times in spectacular fashion."<sup>19</sup> But all agree that pursuing such claims is a long and arduous path, often resulting in decades' worth of litigation, hundreds of thousands, if not millions, of dollars in attorney labor, or in dismissal or failure to enforce judgments awarded.<sup>20</sup> For example, the trial court awarded the Filártiga family nearly \$10.4 million in damages based on Paraguayan, U.S., and international law.<sup>21</sup> The judgment was never collected.<sup>22</sup>

Certain scholars attribute this lack of success—both in terms of verdicts rendered and in terms of damages and settlements awarded and collected—to the "foreignness" of such lawsuits.<sup>23</sup> One thinker dubs the phenomenon "litigation isolationism" and concludes that domestic civil procedural

15. Goldhaber, *supra* note 11, at 128.

16. *Id.* at 128–29.

17. Altholz, *supra* note 4, at 1500 & n.24, 1501 & n.25 (collecting scholarly commentary in support of this proposition).

18. Van Schaack, *supra* note 1, at 2317. Professor Beth Van Schaack also observes that ATS advocates seek to "produce lasting and systematic changes in countries where human rights violations occur" and that the private bar later began to bring such suits and sought attorneys' fees. *Id.* at 2517; *see also* Stephens, *supra* note 13, at 1467 (noting the "modest" impact of ATS suits).

19. David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1950 & n.4 (2008) (explaining the difficulty of obtaining successful mass tort judgments).

20. KOH, *supra* note 11, at 40 n.88.

21. *Id.* at 34, 35 n.18.

22. *Id.* One problem, among many, that advocates have faced is uncovering where assets are located if defendants hide them in offshore bank accounts and in countries that do not extend comity to U.S. judgments.

23. *See* Bookman, *supra* note 2, at 1081; *see also* Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 998 (2015); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1084 (2010). Prior to conducting this quantitative study, I held a similar belief, writing that:

[While the] number of human rights lawsuits filed in the United States against multinational corporate entities has skyrocketed . . . U.S. courts have displayed a marked reluctance to hear such cases, in part due to the heavy administrative burden they impose—for example, resulting from the challenges of managing foreign plaintiffs and witnesses, translation requirements, and extensive documentation—and in part due to the complex and unfamiliar questions of transnational and international law they raise.

Kenney, *supra* note 4, at 861–62.

“avoidance doctrines” such as personal jurisdiction, forum non conveniens, abstention comity, and the presumption against extraterritoriality that she believes are used to dismiss transnational cases in favor of defendants “all speak to the nexus between the United States, the parties, and a given suit.”<sup>24</sup> Other academics and practitioners argue that the surge in conservative scholarship and Department of State’s position on the ATS under George W. Bush “mirror debates about international law” that have become volatile as corporate defendants and U.S. officials are increasingly the targets of these suits.<sup>25</sup> And still other commentators take the argument a step further and contend that a recent Supreme Court decision, *Kiobel v. Royal Dutch Petroleum Co.*<sup>26</sup> (*Kiobel II*), embodies growing hostility toward transnational human rights suits and portends their imminent demise in federal courts.<sup>27</sup>

Although qualitative, and some limited or unpublished empirical, research supports the conclusions above, no scholar to date has undertaken a systematic, quantitative examination to determine whether the numbers actually bear them out.<sup>28</sup> Such a study is important not solely as a descriptive tool, but also as a predictive one. How did major decisions—

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24. Bookman, *supra* note 2, at 1084 & n.18. Bookman defines “abstention comity” as the power to abstain based on international comity concerns. She also lists “the act of state . . . , standing, and the limited enforcement of non-self-executing treaties” doctrines as “transnational litigation avoidance doctrines.” *Id.*; see also *id.* at 1084 n.17. This Article does not address potential critiques of Bookman’s characterization of these doctrines, such as the argument that personal jurisdiction is constitutionally rooted in access to due process.

25. See, e.g., Stephens, *supra* note 13, at 1468.

26. 133 S. Ct. 1659 (2013).

27. See, e.g., William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577 (2014) (suggesting that because the ATS is based on international law, the presumption of extraterritoriality may limit the application of the statute in the future). Many scholars believe other avenues for relief exist. See *infra* note 33.

28. Certain human rights resource centers and advocates used to or do keep informal lists of past and pending ATS cases. See Susan Simpson, *Alien Tort Statute Cases Resulting in Plaintiff Victories*, VIEW FROM LL2, <http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/> (last visited Nov. 27, 2015) (keeping a running list of all ATS cases that “have resulted in something other than complete failure for the plaintiffs who have brought the claims”) [<http://perma.cc/BF6K-UM3S>]. Some scholars, such as Professor Stephens, have purported to possess data related to all ATS suits. See, e.g., Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT’L L. 773, app. at 810–12 (2008) (stating that 185 cases were filed between *Filártiga* and 2008, and providing a brief summary of findings, but no dataset and no in-depth analysis of the cases). Finally, attorney Jonathan Drimmer, in collaboration with Professor Michael Goldhaber, has gathered perhaps the most extensive collection of data. The Appendix to Professor Goldhaber’s article lists past and pending cases against corporate defendants, the year and jurisdiction where the case was filed, and the disposition, if any. Goldhaber, *supra* note 11, at 137–49. Very rarely, the Appendix summarily lists the grounds for dismissal. See, e.g., *id.* at 139. Recently, the U.S. Chamber of Commerce released a study of lower court cases post-*Kiobel II*. JOHN B. BELLINGER III & R. REEVES ANDERSON, U.S. CHAMBER INST. FOR LEGAL REFORM, AS *KIOBEL* TURNS TWO: HOW THE SUPREME COURT IS LEAVING THE DETAILS TO LOWER COURTS (2015), [http://www.instituteforlegalreform.com/uploads/sites/1/Kiobel\\_v6.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Kiobel_v6.pdf) [<http://perma.cc/CN3N-S47S>]. While as a preliminary matter the authors do not release the raw data and do not explain their methodology, they also appear not to account for newly filed cases not on Westlaw. Finally, certain claims are erroneous, as can be seen from the data I make publicly available with this Article.

especially at the circuit and Supreme Court levels—change the strategies adopted by transnational human rights advocates, and how might these strategies change again in the wake of the most recent ripples in transnational human rights litigation? Using suits under the ATS and TVPA as proxies for transnational human rights claims more generally,<sup>29</sup> this Article fills the gap and lays the groundwork for future quantitative analysis. I gather a new dataset of approximately one thousand opinions that reference these statutes. Using this dataset, I analyze the “successes” and “failures” narrowly defined by the win rate for human rights plaintiffs in nonfrivolous, non pro se suits; the magnitude of damages awarded and settlements obtained in these cases; and whether these judgments and settlements are enforced where such data are publicly available.<sup>30</sup> I examine trends in these “successes” and “failures” over time, the doctrines most commonly used to terminate such suits, and how these doctrines have changed, among other observations. After analyzing the data, I offer some thoughts on the future of the trends illustrated.

Part I presents the methodology used to collect and analyze data surrounding these suits. While some datasets partially collect cases litigated under the ATS or TVPA,<sup>31</sup> they often represent fragments of ATS and TVPA suits based on the window of time the author has examined and, for the most part, do not trace these cases beyond the appellate or Supreme Court decisions included in Westlaw or Lexis. This Article is the first to analyze not only all relevant cases since 1980 but also over seven hundred dispositive and nondispositive opinions produced along the way. (Although I tabulate approximately three hundred additional irrelevant, pro se, and frivolous cases, this Article does not analyze them.) It also is the first to trace cases through their entire lifecycles, including, for example, voluntary dismissals and quashed motions to enforce judgments. Finally, it is the first to break the cases down based on the components listed above and many others, providing additional information for future scholars to mine.

Part II discusses two general findings. First, the transnational human rights enterprise is—mostly—modest from a monetary perspective. Courts tend to dismiss roughly 65 to 80 percent of these cases at the pleading stage, and only a handful of cases have led to default judgments or jury verdicts for the plaintiffs. While the size of judgments has been enormous, almost none have been collected in full. Further, while most ATS settlements eclipse their civil rights counterparts, only 7 percent of human rights cases settle. Nevertheless, the enterprise becomes more lucrative than originally thought as the magnitude and number of judgments and settlements

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29. I employ them as proxies because they represent the overwhelming majority of such claims.

30. To the extent that ATS suits have had symbolic value for victims or have enabled or catalyzed policy changes abroad, these outcomes would most certainly count as “successful” and, indeed, likely more so than simple monetary awards. Nevertheless, such results would be extremely difficult to analyze from a quantitative perspective and are not the focus of this Article, which solely examines “success” from a financial perspective.

31. *See supra* note 28.



increases over time and creative shifts in human rights suits post-*Kiobel II* emerge.

Second, the data show that the freestanding grounds typically thought to terminate these suits are different from those imagined. Courts rarely rely on domestic civil procedure “avoidance doctrines” that allegedly show U.S. courts not only fail to engage international law, but have an affirmative allergy to it. The primary grounds courts employ to shunt such suits illustrate courts are willing to engage international law qua international law—they are simply conservative in defining human rights doctrines. In rejecting most plaintiffs’ claims, courts actively grapple with what harms are prohibited by the law of nations<sup>32</sup> and how severe the harms must be to be protected under international law. Courts also look to the identity of the defendants and examine applicable immunity doctrines—including sovereign immunity, head-of-state immunity, diplomatic immunity, and the like—that are staples of international law.

Part III introduces the third major finding. It analyzes cases over five discrete periods bookended by major doctrinal changes. It demonstrates that early suits were framed differently than later suits and that the types of successful suits mutated over time, perhaps due to Supreme Court decisions and important decisions from certain courts of appeals. For example, the particular causes of action and forms of pleading used by plaintiffs, the types of defendants against which suits were filed, and plaintiffs’ responses to certain defenses changed over each of these periods. At the same time, plaintiffs have been able to weather intra-doctrinal shifts, and a core group of claims has remained actionable throughout the entire thirty-five year window. Even when bringing some of these claims became more difficult as doctrines narrowed, the success rate was, and remains, fairly constant.

After analyzing the data, this Article concludes by suggesting that transnational human rights suits are not dead—even if brought against corporations or other private parties not acting “under color of law.” Plaintiffs may have a substantially more difficult time post-*Kiobel II*, but with careful pleading, case, and party selection, they may still be able to carry the day, just as they have always adapted to new doctrinal wrinkles. Other creative means of bringing such suits under different human rights statutes or other causes of action may also arise.<sup>33</sup> In sum, we should not

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32. This phrase was core to the Supreme Court’s second encounter with the Alien Tort Statute, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), but lower courts grappled with its contours for many years before and after it. As such, I use it as shorthand for what some scholars refer to as the “*Sosa* defense” because the data illustrate that the defense arose long before *Sosa*.

33. See generally Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089 (2014) (advocating the application of foreign law to human rights claims); Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013) (suggesting that what would have been ATS claims will be pursued as claims under state law).

Nevertheless, claims under state and foreign law against foreign defendants are now subject to another decision that arguably limits their scope. In *Daimler AG v. Bauman*, the

pronounce the death of transnational human rights suits and should certainly not conclude that courts have shut their doors toward international law even as they narrowly interpret it.

### I. METHODOLOGY

This Article approaches the successes and failures of transnational human rights through an empirical lens. I gathered all known ATS and TVPA opinions in federal court since 1980 through a search in Westlaw for case citations to the sections of the U.S. Code where the statutes are codified.<sup>34</sup> I then parsed the approximately one thousand opinions down by reading the cases and eliminating those where the statutes were merely discussed or mentioned and keeping those where the statute or statutes were relied upon as a cause or causes of action or basis for federal jurisdiction. I further eliminated frivolous lawsuits defined in reference to a court's own characterization of the claim, or suits where the plaintiff was pro se,<sup>35</sup> or, in cases under the ATS, where the plaintiff was not an alien. I also treated multidistrict litigation as distinct cases if the cases had individual docket numbers; I listed them once if all docket numbers were the same (i.e., not double counted). Finally, I coded opinions in a single case based on which opinion was outcome determinative: I marked nondispositive opinions<sup>36</sup> as "relevant" (R), and I marked final adjudications as "yes" (Y) if the case had

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Supreme Court in another 9-0 decision confronted a personal jurisdiction case where the plaintiffs brought claims under California and Argentine law for wrongful death as well as under the ATS and the TVPA for torture and forced disappearances. 134 S. Ct. 746 (2014). During oral argument, counsel for the plaintiffs conceded that it would be an "uphill struggle" to win the ATS claims, but stated they could pursue claims under California's long-arm statute. Transcript of Oral Argument at 45, *Daimler AG*, 134 S. Ct. 746 (No. 11-965). The Court ruled that finding general personal jurisdiction over a foreign corporation simply because its U.S. subsidiary transacted business in a state violates the Due Process Clause "given the absence of any [state] connection to the atrocities, perpetrators, or victims described in the complaint." *Daimler AG*, 134 S. Ct. at 751.

34. Some scholars have criticized the use of Westlaw to gather random samples of data related to issues such as dismissal rates. See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1209 n.24, 1215 & nn.44-45 (2013). Whether these complaints apply to a dataset of *all* cases is unclear. Professor David Engstrom suggests that dismissal rates may appear lower if data from PACER are taken into account because judges are much less likely to write a published opinion should the motion be denied. Cf. *id.* at 1209 n.24. However, we know ATS cases rarely make it to the summary judgment stage because if such motions are denied, the cases may result in trial, and ATS commentators have paid close attention to the trials that have been held. Contrarily, if summary judgment motions are granted, then the case generally results in a published opinion. But see Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 130 (conducting a study of eight district courts and noting that only 40 percent of summary judgment opinions are available on an electronic database). The data take account of all settlements. Thus the only other outcome is that a case dies after surviving a motion to dismiss, which is likely a fairly rare occurrence.

35. All fully resolved pro se cases that relied on the ATS were dismissed. Some pro se cases are still pending.

36. I counted dispositive opinions with respect to the determination of the ATS and TVPA claims. For example, if the court dismissed all ATS and TVPA claims from a suit, this opinion would be dispositive even if other causes of action were allowed to proceed.

been resolved or “ongoing litigation” (OL) if the case is still pending.<sup>37</sup> Cases that are deemed irrelevant because they discuss, but do not rely on, the ATS as a cause of action were marked “no” (N). Pro se (PS) and frivolous (FL) were notated as well.

I next broke down each of the remaining seven hundred opinions by the year resolved or issued; the jurisdiction in which it was brought; the particular cause or causes of action it relied on; the type of defendant against which it was brought (i.e., individual, official, state, agency, corporation, or other entity); the disposition of the case (i.e., a victory for the defendant(s) or plaintiff(s) or a settlement); the stage of the case at which it was resolved (i.e., a motion to dismiss, a motion for summary judgment, a jury trial, a default judgment, etc.); the ground on which the case was resolved (including multiple grounds); the basic facts of the case; the causes of action alleged; any major aspects of the opinion or opinions in the case, including important dicta; if the case resolved in favor of the plaintiff(s), what damages were awarded, if any; and, if damages were awarded, whether the judgment was enforced, taking into account appeals and collateral challenges to the judgments. In addition, I determined which cases settled and, based on any publicly available information such as news articles, the amount of the settlement if such information was available. The settled cases are marked “SET” in the disposition column.

Unlike the limited existing datasets, after first identifying the cases through a Westlaw search, I followed up by examining each case’s docket sheet on Bloomberg Law. This step was crucial to identify, for example, the outcome of a case that had been remanded after an appeal or dismissed on a motion to dismiss with leave to amend or where a default judgment was collaterally challenged upon collection efforts—aspects of a case that go to its ultimate economic “success.” In a few instances, I supplemented the data on Westlaw and Bloomberg with data derived from other sources. The supplemental data comprise only a tiny fraction of the overall dataset. Finally, I collected cases filed post-*Kiobel II* through a search in Bloomberg of the section of the U.S. Code in which the ATS and TVPA are codified.

Although I collected data related to all ATS and TVPA cases filed from 1980 through the present, I also broke them down by time period based on events likely to have influenced the manner in which such cases were litigated or treated by the courts. The first period I examine in this Article is 1980 to 1992, i.e., starting with the year *Filártiga* came down and ending with the year the TVPA went into effect. Soon after *Filártiga*, the D.C. Circuit, in a 1-1-1 split in *Tel-Oren v. Libyan Arab Republic*,<sup>38</sup> dismissed a case alleging that the Libyan government, the Palestine Liberation Organization (PLO), and other groups seized two Israeli buses as well as a

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37. I counted cases as ongoing where motions to dismiss were granted, the court granted leave to file an amended complaint, and the amended complaint is pending. These cases are marked as “OL” in the dataset. Additionally, cases where an appeal, a motion for reconsideration, or a petition for certiorari are pending are counted as “OL.”

38. 726 F.2d 774 (D.C. Cir. 1984).

taxi, torturing and shooting their riders.<sup>39</sup> The per curiam section gave no reason for the dismissal; instead, Judge Bork's concurrence, which questioned the underlying nature of the ATS, became the widespread argument against *Filártiga*.<sup>40</sup> Judge Bork questioned the premise that the ATS gives rise to a cause of action against defendants for violating the law of nations, opined that the ATS was of a purely jurisdictional nature, and reasoned that to construe it otherwise would render all U.S. treaties—past, present, and future—self-executing, a premise rejected under black letter law.<sup>41</sup> He also argued that courts should not infer a cause of action under customary international law.<sup>42</sup>

In 1991, partially in response to *Tel-Oren* and the growing number of ATS suits, Congress enacted the TVPA. The TVPA provides a statutory cause of action for victims of torture and summary execution regardless of their citizenship against any official acting under color of law if the plaintiff first exhausts local remedies and sues within ten years of the violation.<sup>43</sup> Most commentators agree that the TVPA “affirmed the importance of the [ATS] and indicated ‘it should not be replaced.’”<sup>44</sup> Nevertheless, they note that the TVPA did not significantly expand the scope of transnational human rights cases beyond the citizenship aspect.<sup>45</sup> The prevailing wisdom is that most cases alleging these types of harm were filed under both statutes and that the TVPA provided a fallback option in jurisdictions where ATS victories were harder to achieve.

The next period I divide the data into is from 1992 to 1995, i.e., from the year the TVPA went into effect until another well-known Second Circuit decision, *Kadic v. Karadžić*.<sup>46</sup> The defendant in *Kadic* was the head of an insurgent group that de facto controlled parts of the unrecognized Republika Srpska during the Bosnian War and that helped perpetrate the genocide there.<sup>47</sup> The court held that private actors such as the defendant could also be held liable under the ATS even if not acting under color of law—but only for certain violations of the law of nations.<sup>48</sup> The prevailing wisdom is that, after *Kadic*, suits that were previously thought untenable—

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39. *Id.* at 775 (Edwards, J., concurring); *id.* at 798 (Bork, J., concurring).

40. See Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 427–29 (2000).

41. *Tel-Oren*, 726 F.2d at 810–20 (Bork, J., concurring).

42. *Id.* According to Professor Bradley's reading of subsequent law, the Supreme Court later agreed with the first argument, finding a presumption that treaties do not confer a private right of action. CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 207 n.43 (2013) (citing *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008)).

43. 28 U.S.C. § 1350 note § 2 (2012). The TVPA also contains extensive and highly specific definitions of torture and summary execution. *Id.* note § 3.

44. KOH, *supra* note 11, at 36 n.59 (quoting H.R. REP. NO. 102–367, at 1 (1991)).

45. Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1392 n.50, 1428–29 (2008) (citing S. REP. NO. 102–249, at 3–5 (1991)); see also H.R. REP. NO. 102–367, at 3–4 (1992), reprinted in 1992 U.S.C.A.N. 86.

46. 707 F.3d 232 (2d Cir. 1995).

47. *Id.* at 232.

48. *Id.* at 239. The Court did not extend its holding to the TVPA. *Id.*

i.e., those against private actors, including corporations—began to be filed in relatively large numbers.<sup>49</sup> Indeed, immediately after *Kadic*, the first case alleging jurisdiction against a corporation for a noncommercial tort was filed: *Doe I v. Unocal Corp.*<sup>50</sup> The case involved a multinational oil giant acting in Myanmar.<sup>51</sup> The plaintiffs argued that the company and its partners knew that the country's military "use[d] violence and intimidation to relocate whole villages, enslave farmers[,] . . . and steal . . . property for the benefit of [the oil] pipeline."<sup>52</sup> According to the plaintiffs, this conduct caused "the [villagers] to suffer death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property, in violation of state law, federal law, and customary international law."<sup>53</sup>

The third time period is 1996 to 2004, from *Kadic* through a Supreme Court decision following up on some of the issues raised in *Filártiga*. *Filártiga* had not defined the "law of nations," though it did specify that the phrase's meaning must be determined by present-day international norms, not international norms as they stood at the passage of the first Judiciary Act.<sup>54</sup> In 2004—after more than two decades of debate in the lower federal courts as to the precise contours of what sorts of transnational human rights suits were actionable—the Supreme Court finally weighed in with *Sosa v. Alvarez-Machain*.<sup>55</sup> The plaintiff, Humberto Alvarez-Machain, was a Mexican doctor who allegedly had participated in the torture and killing of a U.S. Drug Enforcement Administration (DEA) agent by prolonging his life during torture sessions.<sup>56</sup> After the Mexican government refused to extradite Alvarez-Machain, stating he would be prosecuted in Mexico,<sup>57</sup> the

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49. See Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 208 (2005).

50. See *Doe I v. Unocal Corp.*, No. 2:96-cv-06959 (C.D. Cal. Oct. 3, 1996). *Wiwa v. Royal Dutch Petroleum Co.*, No. 1:296-cv-08386 (S.D.N.Y. Nov. 8, 1996), was filed one month later.

51. *Doe I v. Unocal Corp. (Unocal I)*, 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, *Doe I v. Unocal Corp. (Unocal II)*, 395 F.3d 932 (9th Cir. 2002), *appeal dismissed per stipulation en banc*, *Doe I v. Unocal Corp. (Unocal III)*, 403 F.3d 708 (9th Cir. 2005). I refer to the country as Myanmar rather than Burma because the court of appeals referred to it as such. I do not wish to imply any political stance through such use.

52. *Id.* Prior to *Unocal I*, other cases advanced the theory that corporations could be held liable for violations of the law of nations—to no avail. For example, in *Canadian Overseas Ores Ltd. v. Compañía de Acero Del Pacífico S.A.*, a dispute arose over whether a Chilean company was a "foreign entity" under the Foreign Sovereign Immunities Act (FSIA) and thus whether the court had jurisdiction over it. 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984). The court held it could not exercise jurisdiction and, in passing, stated that the plaintiff's reliance on the ATS was also insufficient to obtain jurisdiction over the defendant because "commercial violations . . . do not constitute violations of international law." *Id.* at 1347 (citing *Verlinder B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 325 n.16 (2d Cir. 1981)).

53. *Unocal I*, 963 F. Supp. at 883.

54. *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

55. 542 U.S. 692 (2004).

56. *Id.* at 697.

57. *United States v. Alvarez-Machain*, 504 U.S. 655, 670–71 (1992) (Stevens, J., dissenting).

DEA hired Mexican nationals to kidnap him and bring him to the United States, where he was detained and tried.<sup>58</sup> The trial court acquitted Alvarez-Machain, and he sued Sosa, one of the men who abducted him, as well as other Mexican citizens, DEA agents, and the United States itself under the ATS.<sup>59</sup> The district court dismissed the U.S. defendants but awarded Alvarez-Machain \$25,000.<sup>60</sup> The Ninth Circuit affirmed in a panel decision and on en banc review, holding that the ATS accepted a “clear and universally recognized norm prohibiting arbitrary arrest and detention.”<sup>61</sup> In *Sosa*, the Supreme Court reversed the Ninth Circuit, proclaiming: “[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.”<sup>62</sup> The Court elaborated that while the tort must be a violation of the present-day law of nations, such law must be “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” such as piracy, violations of safe conduct, and offenses against ambassadors.<sup>63</sup> The Court then ruled that Alvarez-Machain’s claim did not pass this test because he had been detained for “less than a day,” was then transferred to the “custody [of] lawful authorities,” and had a “prompt arraignment.”<sup>64</sup> Commentators debate whether *Sosa* raised the bar set by *Filártiga*—cabining or expanding the claims considered violations of the law of nations.<sup>65</sup>

The fourth major time period is 2004 to 2013, from the year when the Supreme Court decided *Sosa* up until another pathmaking Supreme Court decision on the ATS. On April 17, 2013, the Supreme Court issued a unanimous opinion in *Kiobel v. Royal Dutch Petroleum Co.*<sup>66</sup> (*Kiobel II*). The plaintiffs alleged that the oil company and its partners “enlisted the Nigerian Government to violently suppress [] burgeoning demonstrations” against the “environmental effects” of the consortium’s operations and accused the companies of “aiding and abetting” the Nigerian military and police forces, which killed, beat, raped, and arrested the protestors.<sup>67</sup> Writing for the majority, Chief Justice Roberts held that because the plaintiffs, the defendants, and the alleged violations of the law of nations were outside the United States, the case did not “touch and concern” the United States with sufficient force to displace the presumption against

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58. *Sosa*, 542 U.S. at 698.

59. *Id.*

60. *Id.* at 699.

61. *Id.* (quoting Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003)).

62. *Id.* at 725.

63. *Id.*

64. *Id.* at 738.

65. See Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 533–34 (2005) (predicting that *Sosa* would not affect the success of ATS suits); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2293 (2004) (arguing *Sosa* was a boon, not a bust, for ATS plaintiffs).

66. *Kiobel v. Royal Dutch Petroleum Co (Kiobel II)*, 133 S. Ct. 1659, 1663 (2013).

67. *Id.* at 1662–63.

extraterritoriality embedded in all statutes.<sup>68</sup> The presumption embodies the principle that U.S. law applies within the territorial boundaries of the United States “but does not rule the world.”<sup>69</sup> The presumption is displaced if a statute provides a “clear indication of an extraterritorial application,”<sup>70</sup> such as the provision giving U.S. courts jurisdiction over genocide, no matter where committed, if the “alleged offender is, among other things, ‘present in the United States.’”<sup>71</sup> The Court explained the principle behind the presumption: to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>72</sup> Neither the text nor the history of the ATS indicated that jurisdiction should attach on the facts there given their lack of nexus to the United States.<sup>73</sup> Justice Kennedy wrote a separate concurrence to emphasize that “[o]ther cases may arise [under the law of nations] . . . covered neither by the TVPA nor by the reasoning and holding of today’s case” that may warrant additional “elaboration and explanation.”<sup>74</sup> Justice Breyer, who wrote for Justices Ginsberg, Sotomayor, and Kagan, concurred in the judgment. Justice Breyer argued that jurisdiction under the ATS should attach, under certain circumstances, even to events that occurred abroad—for example, where the defendant is a U.S. national.<sup>75</sup> Nevertheless, even Justice Breyer argued that jurisdiction should be “consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement.”<sup>76</sup> In this case, he agreed with the majority that there was an insufficient nexus because mere corporate presence in the form of a NYSE listing or public relations office does not suffice for jurisdiction.<sup>77</sup> Justice Alito, writing for himself and Justice Thomas, concurred.<sup>78</sup> He argued that suits under the ATS are only viable if the conduct is exclusively within the United States.<sup>79</sup>

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68. *Id.* at 1669.

69. *Id.* at 1664 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

70. *Id.* at 1664.

71. *Id.* at 1665 (citing and quoting 18 U.S.C. § 1091(e) (2006 & Supp. V 2011)).

72. *Id.* at 1664 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

73. *See id.* at 1669.

74. *Id.* (Kennedy, J., concurring). Justices Breyer, Ginsberg, Sotomayor, and Kagan concurred in the judgment, arguing instead for a disjunctive test finding jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

*Id.* at 1670–71 (Breyer, J., concurring in the judgment).

75. *See id.* at 1671.

76. *Id.*

77. *Id.* at 1670–71.

78. *Id.* at 1669 (Alito, J., concurring).

79. *Id.* at 1669–70.

The last period is *Kiobel II* onward, i.e., 2013 to 2015.<sup>80</sup> Although not much time has passed since *Kiobel II*, many cases have been resolved in its wake. This Article captures the outcomes and important opinions since then. It does not run statistical regression analyses to predict the future of such cases because there are not enough data to accurately do so and, even if there were, the sheer number of variables and the inability to capture behavioral changes affected by such variables make the task virtually impossible. Instead, this Article offers informed speculation as to the future of transnational human rights suits. The rest of my findings are based on tabulation. Any inferences drawn regarding the factors that influence them are again based on informed guesswork.

## II. GENERAL FINDINGS

Based on the dataset and a narrow metric of “success” defined in reference to the frequency of plaintiff wins, the amount of monetary awards and settlements reached, and whether these awards and settlements were enforced, this Article concludes that the consensus that ATS and TVPA suits are a modest enterprise is mostly correct.<sup>81</sup> In reaching this determination, I examine a variety of factors: dismissal rates at the motion to dismiss stage; settlement rates and amounts; and default judgments and trials.<sup>82</sup> The data show that the majority of suits are dismissed at the pleading stage, an aberration from other areas of law where motions to dismiss are only *filed* in a tiny fraction of federal cases, including those with gruesome fact patterns resembling ATS and TVPA cases.<sup>83</sup> It is also correct that the settlement rate for ATS and TVPA cases is low relative to civil rights suits, and therefore the economic gains of these settlements are blunted.<sup>84</sup> Nevertheless, the *total* magnitude of known settlement amounts increased over time as well, with the exception of the latest (and shortest) period in which there have been, by definition, fewer opportunities for settlements to arise.<sup>85</sup> The magnitude of ATS and TVPA judgments and settlements is also higher as a general matter than civil rights cases, even if they are unenforceable or at least have not been enforced up through the present.<sup>86</sup> Thus, the ATS and TVPA are perhaps more economically viable than typically thought.<sup>87</sup>

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80. The data are current through November 12, 2015, when this Article was sent to press.

81. *See infra* Part II.A–C.

82. *See infra* Part II.A–C.

83. *See infra* Part II.A.

84. *See infra* Part II.B.

85. *See infra* Part II.B.

86. Judgments obtained under the ATS that have not yet been enforced are not necessarily permanently unenforceable. If plaintiffs are able to uncover hidden assets, the likelihood of receiving compensation increases if the nation or nations where the money is located extend comity to U.S. judgments. But see *infra* Part II.C and accompanying notes for a discussion of the litigation arising from the Marcos regime in Philippines.

87. *See infra* Part II.



The data also suggest that conclusions drawn regarding hostility toward international law or the foreignness of lawsuits are, at least in part, misplaced. Courts are actually more likely to rule for plaintiffs than defendants if the suit makes it to the merits. Of course, this may illustrate the rigor to which cases of this nature are subject, but it also demonstrates that courts are not closing their doors entirely, as might be expected if the postulates advanced by litigation isolationists were true. Awards have also increased over time, even while the percentage of default judgments has fallen, also suggesting that judges and juries are sympathetic to plaintiff claims and consider the level of injustice these cases present. Further, the doctrines courts have predominantly used to dismiss ATS and TVPA suits differ from those that certain prominent scholars believe are used to shunt transnational cases.<sup>88</sup> Almost no cases are dismissed on “abstention doctrines,” such as comity or forum non conveniens, that such scholars argue are based on adherence to the principle that courts should not intervene in international affairs.<sup>89</sup> The dismissal doctrines actually used oscillate in relative importance based on the time period, but the two used primarily throughout are failure to state a claim under the law of nations and sovereign immunity—with the exception of the post-*Kiobel II* period dominated by considerations of the presumption against extraterritoriality.<sup>90</sup> These two doctrines do not reject international law because they only limit the *type* of transnational suits that can be brought in U.S. courts based on their severity and the type of actor involved, rather than rejecting these suits wholesale.

This part is broken down into aspects that reveal the overall “success” of ATS and TVPA suits and courts’ attitudes to these suits writ large.

#### A. Dismissal Rates

The most striking observation over the past thirty-five years is the high overall dismissal rate of ATS and TVPA cases. In total, approximately 325 nonfrivolous, non pro se cases<sup>91</sup> that rely on one or both statutes for their

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88. See *infra* Part II.D.

89. See *infra* Table 1.

90. See *infra* Table 1.

91. Approximately 110 additional pro se cases were filed, mostly on the basis that the plaintiff-prisoners were mistreated in violation of the Vienna Convention, for example by not being advised of their *Miranda* rights in English, *De Los Santos Mora v. Brady*, No. 06-Civ-46, 2007 WL 981605, at \*1–2 (D. Del. Mar. 30, 2007) (dismissing a citizen of the Dominican Republic’s complaint alleging that the officer advised him and another passenger in the car of their *Miranda* rights, but as a Spanish speaker, he did not understand them), or by being denied the opportunity to consult with their consulates after being arrested, *Keszthelyi v. Bowman*, No. 1:06-Civ-187, 2007 WL 626221, at \*3–4 (E.D. Tenn. Feb. 23, 2007) (dismissing a South African national’s claim based on the alleged failure to advise him, after arresting him, of his right (under Article 36 of the Vienna Convention) to contact the South African consulate).

This number also excludes cases in which the plaintiff or plaintiffs is or are not aliens, cases that Professor Stephens included when she tabulated how many ATS cases had been resolved between 1980 and 1997. See Stephens, *supra* note 13, at 1447, 1448 & n.117.

causes of action were resolved from 1980 to 2015,<sup>92</sup> with twenty-seven suits still pending.<sup>93</sup> Out of the approximately 325 cases that were resolved, approximately 220 were dismissed at the pleading stage<sup>94</sup> (around 68 percent), with only thirty-one of these approximately 220 (around 14 percent) dismissed without prejudice. This is a shocking inversion of the role played by motions to dismiss in most cases even after *Bell Atlantic Corporation v. Twombly*<sup>95</sup> and *Ashcroft v. Iqbal*<sup>96</sup> (together, “*Twiqbal*”), which, at least according to some studies, increased dismissal rates at the pleading stage.<sup>97</sup> Indeed, post-*Twiqbal* motions to dismiss are only filed in approximately 6 percent of all federal civil cases.<sup>98</sup> In § 1983 cases, which are often considered the least successful domestic civil rights cases and which often share many fact patterns with ATS and TVPA cases (e.g., physical abuse), motions to dismiss are filed approximately 12 percent of the time.<sup>99</sup> Of the motions to dismiss in all cases as of 2010, 75 percent

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92. These suits may include additional causes of action typically arising from the Anti-Terrorism Act (ATA), Trafficking Victim Protection Reauthorization Act (TVPRA), Racketeering Influenced and Corrupt Organizations Act (RICO), or domestic tort laws, and if plaintiffs prevail, the win may turn on these other causes of action. Nevertheless, the ATS and TVPA are significant enough claims to merit separate discussion by the deciding court if these claims are dismissed or still pending when a settlement is reached. *See, e.g.*, Javier H. v. Garcia-Botello, 239 F.R.D. 342 (W.D.N.Y. 2006) (granting leave to amend RICO complaint by adding ATS claims). The case partially settled on May 24, 2013, with ATS claims still pending. Javier H. v. Garcia-Botello, No. 1:02-cv-00523, slip op. at 1–4 (W.D.N.Y. May 24, 2013).

93. *See supra* note 37 for the definition of “pending.” Of the pending cases, nine have been dismissed and are awaiting the outcome of an appeal, a decision on an amended complaint, or an additional dispositive action.

94. This figure does not disaggregate 12(b)(6) motions from 12(b)(1) and 12(c) motions, but that is because courts themselves often do not do so in this context. For example, if the defendant argues that the alleged acts do not amount to a violation of the law of nations, and a court finds such an argument persuasive, the court could *either* find that the complaint fails to state a claim because the facts alleged do not rise to a recognized violation of the law of nations (such as forced labor) *or* find that the court lacks subject matter jurisdiction over the complaint because forced labor is not a violation of the law of nations. In reaching the former conclusion, a court would generally assume for the sake of argument that forced labor *could* violate the law of nations but did not under these specific factual conditions, effectively blurring the distinction among the three motions.

95. 550 U.S. 544 (2007).

96. 556 U.S. 662 (2009).

97. Compare JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), <http://www.uscourts.gov/file/17889/download> (conducting an empirical study using the CM/ECF filing system to show that new pleading standards do not affect dismissal rates) [<http://perma.cc/234L-MJDY>], with Engstrom, *supra* note 34, at 1234 (estimating an overall *Twiqbal* effect of approximately 11 percent). Importantly, Professor Engstrom notes that post-*Twiqbal*, parties to lawsuits themselves have demonstrated a selection bias that accounts for much of the effect. Engstrom, *supra* note 34, at 1219 n.54, 1223 n.66. That is to say, post-*Twiqbal* not only did some greater percentage of courts dismiss claims, but also plaintiffs may have filed fewer or different claims, defendants may have filed more motions to dismiss, and settlement dynamics may have changed. *Id.* at 1223–24.

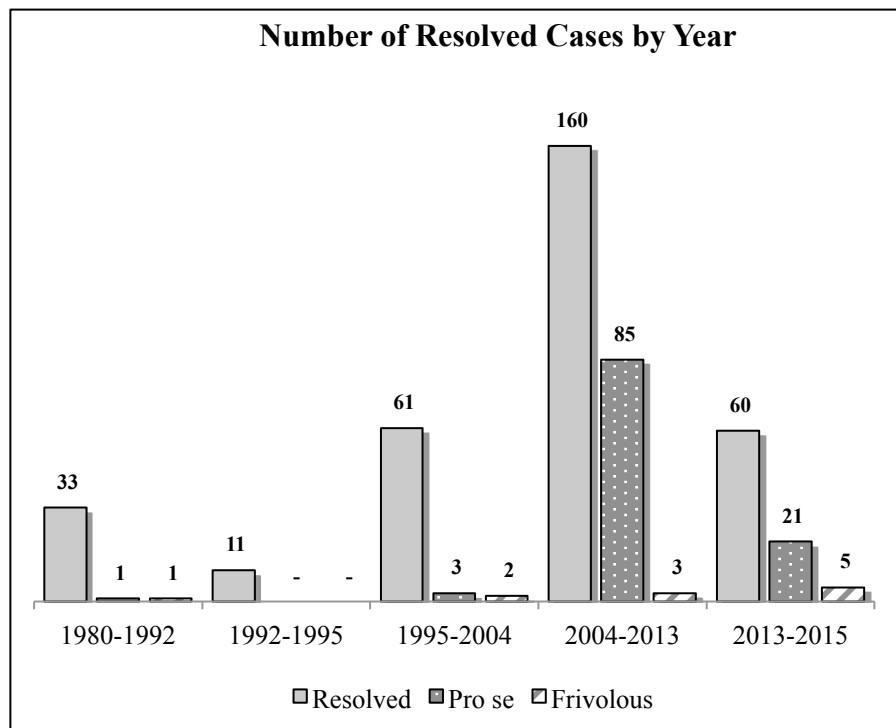
98. CECIL ET AL., *supra* note 97, at 8.

99. *Id.* at 8–9.

were granted in whole or in part.<sup>100</sup> But of these 75 percent, 35 percent were granted with leave to amend.<sup>101</sup> In civil rights cases, 78 percent of motions to dismiss were fully or partially granted, but 33 percent of these dismissals included leave to amend.<sup>102</sup> As such, not only do ATS and TVPA suits have a likelihood of dismissal that is an order of magnitude higher than these cases, but courts also frequently conclude that plaintiffs could not allege additional facts that would change the outcome and therefore dismiss with prejudice.<sup>103</sup>

As shown in Figure 1, the volume of resolved cases increased dramatically over time, with the exception of the 1992 to 1995 and 2013 to present periods—which is to be expected given the narrower time window.

Figure 1



100. *Id.* at 13.

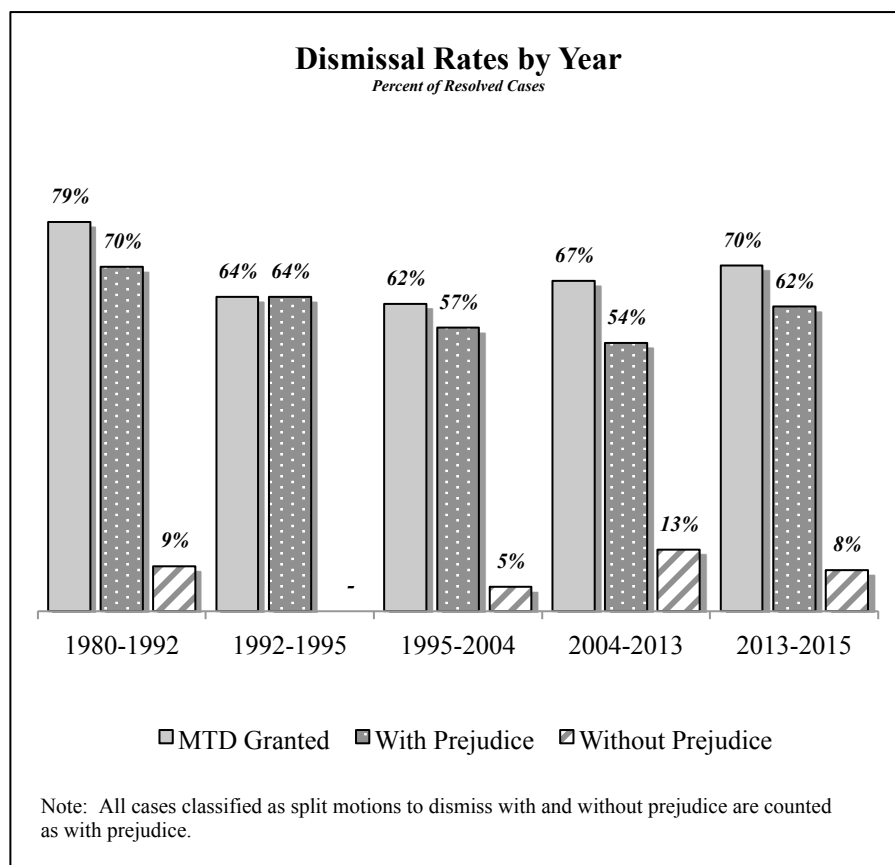
101. *Id.* at 14.

102. *Id.* at 8.

103. That such motions were so easily granted in ATS and TVPA cases of course has huge ramifications not only for the possibility of obtaining relief for the plaintiffs, but also for exposing the wrongs perpetrated through discovery. While limited jurisdictional discovery is granted in some cases, this is a rarity. As such, the symbolism and “soft” success of these cases are also called into question.

Nevertheless, despite the increase in caseloads from 2004 to 2013, the dismissal rate remained within a 15 percent range for all periods.<sup>104</sup> Dismissals slightly increased over time, with the exception of the 1980 to 1992 period.<sup>105</sup> Many cases have been dismissed post-*Kiobel II*—indeed, more than in the 1995 to 2004 period in absolute terms. Yet, the dismissal *rate* for the most recent post-*Kiobel II* period is actually on par with other periods as demonstrated by Figure 2.

Figure 2



104. See *infra* Figure 2.

105. One prominent scholar has suggested that corporate lawsuits are weaker if brought by private sector lawyers who possess less familiarity with the statute and make weaker factual allegations and that the entrance of major law firms as defense counsel in the wake of corporate lawsuits resulted in doctrinal changes that made it more difficult for plaintiffs to prevail. See Email from Beth Van Schaack, Visiting Professor in Human Rights 2014–2015, Stanford Law Sch., Professor of Law, Santa Clara Univ. Sch. of Law, to author (Mar. 31 2015, 16:35 PST) (on file with the author). This Article does not examine such factors in depth, which would require tabulation of the types of organizations representing the plaintiffs. It does, however, examine the success rate of corporate lawsuits and the evolution of dismissal grounds over time, which may partially shed light on this postulate.

The high dismissal rate does support the proposition that transnational human rights suits have modest economic outcomes as the vast majority of them result in no payout whatsoever. Of course, it would be difficult if not impossible to account for all variables that explain why courts have dismissed suits at these rates over the past thirty-five years. This exercise is particularly difficult without going into the precise nature of the claims brought, including not simply the causes of action alleged, but also the factual allegations made in support of them. Nevertheless, the postulate that courts are increasingly hostile toward these claims because of their foreignness seems unlikely given the relative stability in this dismissal rate.<sup>106</sup> Or else, if courts have become increasingly hostile toward these cases, plaintiffs have been able to circumvent this increased hostility through the types of claims they bring, the manner in which they couch these claims, and the manner in which they respond to defenses—the three factors most likely to be relevant at the pleading stage. Indeed, as Part III shows, the types of claims alleged varied as the periods evolved, with higher dismissal rates for harms of a lesser magnitude than torture, genocide, and extrajudicial killings—some core claims that remained actionable throughout.

### B. Settlement

A single-digit percentage of ATS and TVPA cases settle, yet the few settlements reached are often in the tens of millions of dollars, as illustrated by Figure 3. This suggests that the transnational human-rights enterprise is indeed modest, but perhaps only mostly so. Out of the 325 cases brought by ATS and TVPA plaintiffs, only twenty-three (approximately 7 percent) had settled as of this Article's publication.<sup>107</sup> It is hard to tell how large many of these settlements are, because they are, for the most part, confidential. Nevertheless, known settlements generally eclipse those in the domestic civil rights arena with the possible exception of class action employment discrimination lawsuits.<sup>108</sup> The largest known corporate settlement under the ATS was over Swiss banks that secretly retained the deposits of Jewish customers killed during the Holocaust.<sup>109</sup> The case

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106. Of course, this combination likely rules out docket clogging as well. That courts are not dismissing these cases at a higher rate at an earlier stage, even when the claims spiked and when the complexity of these cases was at its peak, suggests courts are not merely throwing out these cases because they take up more space.

107. For purposes of this Article, if a case settled after a motion to dismiss with leave to amend, it was not counted as a dismissal but rather as a settlement. As such, the dataset does not reflect the lifecycle of a case with perfect verisimilitude. For counting purposes, this Article excludes certain settlements, though they are included in the dataset. *See infra* notes 110, 113. This Article also excludes probable or possible settlements where, for example, the parties voluntarily dismissed claims after a favorable ruling for the plaintiff(s).

108. *See* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 368–69 (2008) (collecting cases from the 1990s and 2000s resulting in payouts ranging from \$54 to \$190 million against major corporate defendants for employment discrimination).

109. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141–42 (E.D.N.Y. 2000).

settled in 1998 for a record-breaking \$1.25 billion and “was followed by actions by World War II slave laborers, which were settled for more than \$5 billion” and “additional claims arising out of the Holocaust and other World War II atrocities, the Armenian genocide, and U.S. slavery, among others.”<sup>110</sup> The largest civil rights settlement in U.S. history for the Department of Agriculture’s alleged systematic racial discrimination in awarding financial assistance after the promise of “an acre and a mule” was initially valued at approximately \$2.25 billion, but only \$1 billion was ever collected.<sup>111</sup> The case, which dates from the Clinton Administration, has inspired follow-up litigation that in turn settled for \$1.1 billion.<sup>112</sup> Of course, the Holocaust and slavery reparations suits are outliers in the ATS and civil rights arenas, respectively. Nevertheless, other ATS settlements still managed to clock in around the tens of millions mark. For example, the next largest agreement after the Holocaust litigation,<sup>113</sup> *Doe I. v. Unocal Corp.*,<sup>114</sup> allegedly settled for \$30 million.<sup>115</sup> The lowest settlement

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110. *Id.*; STEPHENS ET AL., *supra* note 13, at 543. There are good reasons to discount these settlements, as Professor Goldhaber does, Goldhaber, *supra* note 11, at 129 n.12, given the diplomatic pressure exerted by the U.S. government to obtain them, *see, e.g., In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 142, the fact that some, at least, were settled pursuant to bilateral treaties (not the ATS or TVPA), and the fact that many were based on causes of action generally not recognized under the ATS, such as expropriation of property, *see, e.g., Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (describing a suit for the expropriation of assets by descendants of Jewish customers of French banks); *Cases and Representative Matters*, CARLIN LAW OFFICES, <http://www.carlinlawoffices.com/cases.html> (last visited Nov. 27, 2015) (explaining that the case settled for \$300 million) [<http://perma.cc/S4YL-UK9X>]. For the purposes of this Article, I similarly do not include them.

111. Kelly Toledano, *Making Good on Broken Promises: How the Pigford Settlement Has Given African-American Farmers a Second Chance*, 5 S. REGION BLACK L. STUDENTS ASS’N L.J. 68, 80–81 (2011).

112. Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 341 (2013) (describing the Claims Resolution Act of 2010 that created a \$1.1 billion fund to finance the *In re Black Farmers Discrimination Litigation* settlement).

113. For counting purposes, this Article excludes the \$75 million settlement reached after the United States District Court for the Southern District of New York dismissed the Nigerian plaintiffs’ allegations against Pfizer that the drug company tested a drug for meningitis without their informed consent because the settlement was premised on a concomitant suit brought by the government of Nigeria and the state of Kano against Pfizer in Nigerian courts. *Abdullahi v. Pfizer, Inc.*, No. 01-Civ-8118, 2005 WL 1870811, at \*188 (S.D.N.Y. Aug. 9, 2005) (dismissing case for multiple reasons, including that testing without informed consent did not violate the law of nations), *rev’d and remanded*, 562 F.3d 163, 187 (2d Cir. 2009) (holding that medical experimentation under these circumstances violated the law of nations and instructing the district court to evaluate forum non conveniens factors). *See also Pfizer Lawsuit (re Nigeria)*, BUS. & HUMAN RTS. RESOURCE CTR., <http://business-humanrights.org/en/pfizer-lawsuit-re-nigeria#c9346> (last visited Nov. 27, 2015) [<http://perma.cc/JG5D-T8F7>].

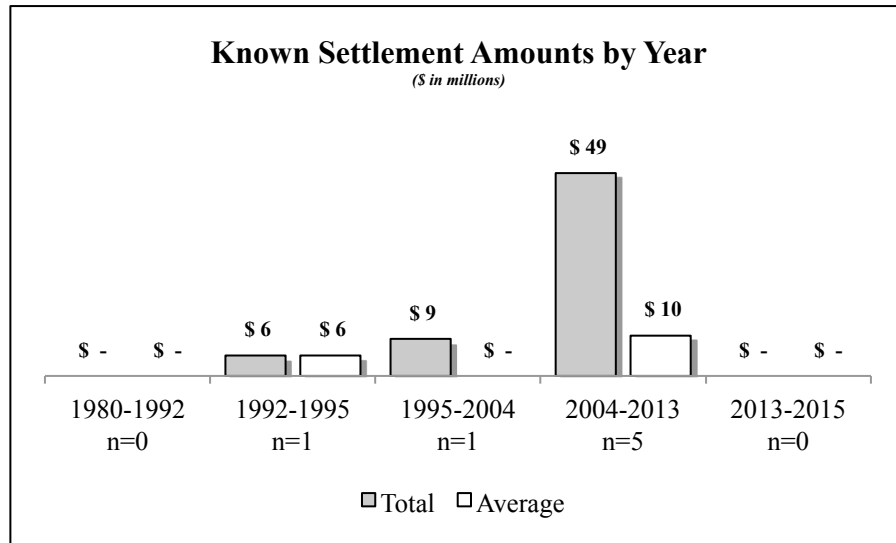
114. 395 F.3d 932 (9th Cir. 2002), *appeal dismissed per stipulation en banc*, 403 F.3d 708 (9th Cir. 2005).

115. Goldhaber, *supra* note 11, at 129.

involved an Iraqi security contractor, which provided \$100,000 per deceased plaintiff and \$20,000 to \$30,000 per injured plaintiff.<sup>116</sup>

The settlement rates and amounts varied significantly. The greatest absolute number of settlements occurred in the 2004 to 2013 period, with twelve cases settling. The absolute payouts of these settlements (excluding the Holocaust settlements) dwarfed prior periods.

Figure 3



The fact that these settlements occurred seems to be proof that courts are *not* hostile against corporate claims. Courts universally denied corporations' motions to dismiss in cases prior to these settlements, assuming—and in some case explicitly deciding—that corporations could be held liable under international law.<sup>117</sup>

### C. Trials and Default Judgments

Interestingly, although the odds are against a plaintiff at the pleading stage, if he or she survives a motion to dismiss, he or she has a decent chance of winning on the merits, again suggesting the suits are potentially

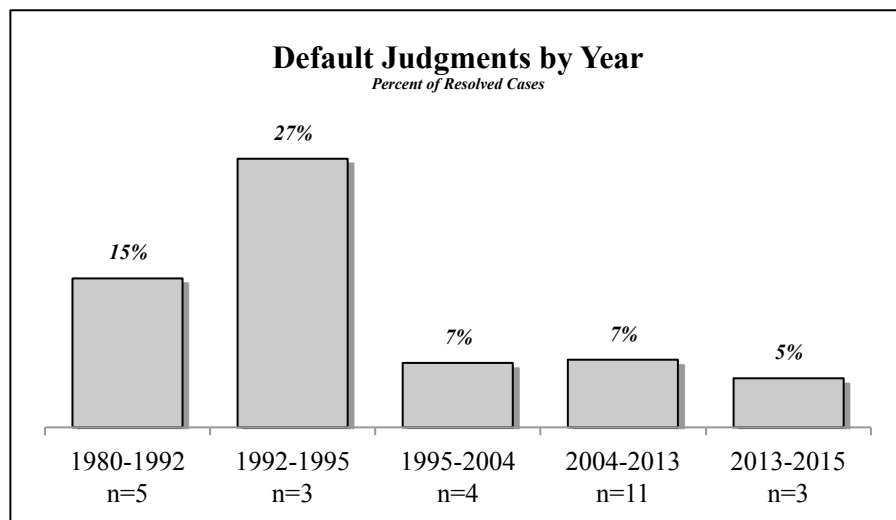
116. *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (dismissing a complaint against businesses and an owner for killing or seriously injuring Iraqi citizens while providing security to U.S. nationals; this case was settled privately).

117. Only one decision ever indicated otherwise, and it was not premised on hostility toward international law, but rather on a conservative interpretation of it. See *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 118, 120 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013); see also *infra* Part III.D. Prior to *Kiobel I*, the Second Circuit itself assumed corporations could be liable in nine different cases. See *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 254 n.125 (S.D.N.Y. 2009) (collecting cases).

less modest than advertised.<sup>118</sup> Out of the 325 cases resolved, fifty-six (17 percent) made it to the merits.<sup>119</sup> In these cases, plaintiffs prevailed approximately 63 percent of the time. And often when the defendants prevailed—for example, when default judgments were denied *sua sponte*—these rulings were based on technical grounds, like sovereign immunity, rather than whether the defendant had actually committed the violations. This contrasts with the figures from civil rights cases, in which plaintiffs lose because insufficient evidence supports their claims.

There are too few trials to meaningfully assess success rates over time. Interestingly, however, the number of default judgments is higher than the number of trials, and therefore some observations can be made. (The percentage—though not the absolute number—of default judgments decreased over time.<sup>120</sup>)

Figure 4



It is possible that this trend evinces judicial hostility toward human rights claims in U.S. courts, as at least some courts examined on their own initiative whether such cases should be dismissed without an appearance from the defendant. More likely, though, the trend results from the fact that cases were increasingly brought against corporations, which are far more

118. Only seven were decided at the summary judgment stage. Other cases were decided at a variety of different stages such as a voluntary dismissal. Because there are many cases with miscellaneous procedural postures, this Article does not detail them all, although the dataset does.

119. For purposes of this Article, cases that make it to the merits involved a trial or default judgment, either granted or denied or some other equivalent determination. This excludes cases decided on summary judgment, cases that settled, cases that were voluntarily dismissed after surviving a motion to dismiss, and other equivalent determinations.

120. See *infra* Figure 4.



likely to appear than individual defendants located outside of the United States. Indeed, of the approximately 325 cases, at least 127 (38 percent) had a corporate defendant, and no case between *Filártiga* and *Kadic* had corporate defendants.<sup>121</sup> Of the three judgments against corporations—of which two were default judgments and the third a jury trial<sup>122</sup>—one was reversed on appeal,<sup>123</sup> and in another the plaintiffs voluntarily withdrew after the defendant later appeared to challenge enforcement.<sup>124</sup> As such, the decrease in default judgments—which includes the 1995 to 2004 period when the doctrinal conditions were arguably the most favorable for these cases—is probably due to the defendants actually appearing.<sup>125</sup> And of the two nonfrivolous default judgments that were denied, one was based on doctrines that, as explained in Part II.D, do not reflect a belief that the case lacks a sufficient nexus to the United States or litigation isolationism.<sup>126</sup>

Nevertheless, despite the percentage decrease in awards that suggests these suits are not as successful as they used to be, the number of cases in which damages were awarded increased over time, as did the magnitude of these awards.<sup>127</sup>

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121. Some cases had corporate plaintiffs. *See infra* Part III.

122. *See* Chowdhury v. Worldtel Bangladesh Holding, No. 1:08-cv-01659, slip op. at 1–2 (E.D.N.Y. Aug. 4, 2009) (reporting trial verdict awarded to torture victim detained by Bangladeshi police at the behest of his employer after he refused to turn over his stake in the company); *Licea v. Curacao Drydock Co.*, No. 1:06-cv-22128, slip op. at 1–2 (S.D. Fla. Nov. 7, 2013) (awarding judgment of \$80 million against the defendant, a shipping company involved in human trafficking with the government of Cuba); *Aguilar v. Imperial Nurseries*, No. 3:07-Civ-193, 2008 WL 2572250, at \*1–2 (D. Conn. May 28, 2008) (granting default judgment in an H-2 visa human trafficking case).

123. *Chowdhury v. Worldtel Bangladesh Holding*, 746 F.3d 42, 54–55 (2d Cir. 2014) (overturning jury verdict).

124. *Licea v. Curacao Drydock Co.*, No. 1:06-cv-22128, slip op. at 1–2 (S.D. Fla. Sept. 17, 2015) (granting voluntary dismissal).

125. Many individual defendants are located outside of the United States. In contrast, most corporations have an office in the United States to receive service of process.

126. *See* *Chen v. China Cent. Television*, 320 Fed. App'x 71 (2d Cir. 2009) (dismissing sua sponte a claim against a Chinese television station because the station was an instrumentality of the state under the FSIA); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004) (dismissing a claim on a motion of United States against local Chinese officials for abusing Falun Gong practitioners on the basis that the suit violated the act of state doctrine). *But see* *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (dismissing action based on border attacks between Israel and Lebanon, alleging that banks and others were involved in transfers of funds from the Islamic Republic of Iran to the terrorist group that carried out the attacks based on the presumption against extraterritoriality).

127. *See supra* Figures 3, 4; *infra* Figures 5, 6.

Figure 5

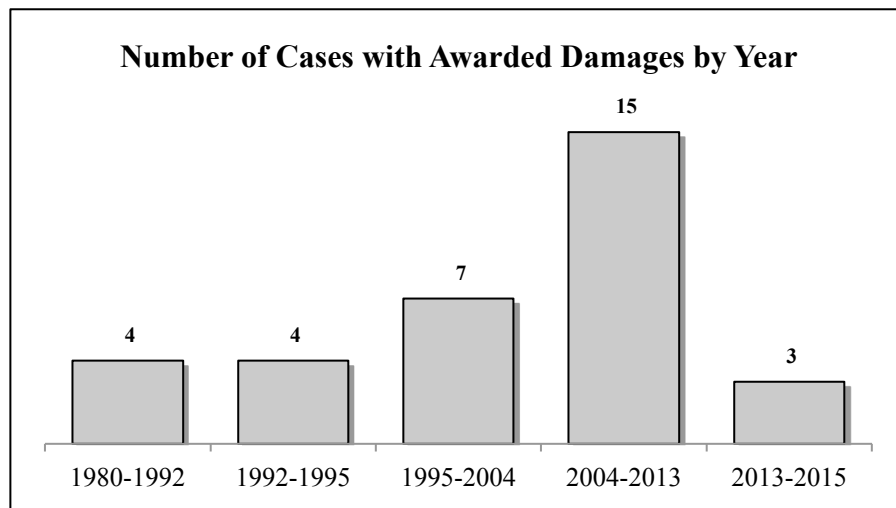
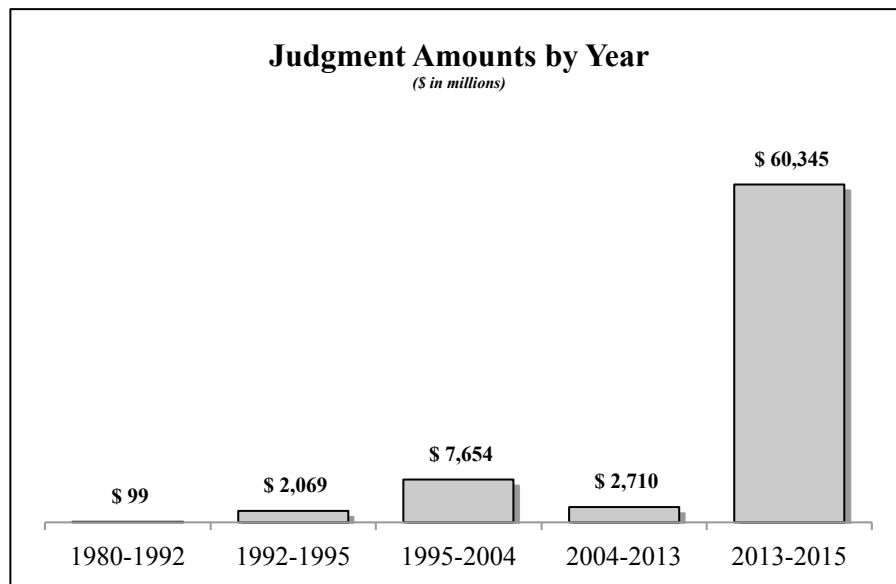


Figure 6



The judgments, like the settlements, dwarf judgments in domestic areas of law, including civil rights and intentional torts. Ultimately, almost none of these judgments have been collected because the defendants fled the country after they were sued, did not possess assets in the United States, or failed to appear.<sup>128</sup> Nevertheless, most judgments are in the hundreds or

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128. *But see supra* note 86.

tens of millions of dollars, with a handful in the billions, as illustrated by Figure 6. For example, when the former dictator of the Philippines and his daughter were sued for the massacre of ten thousand citizens, the court awarded \$1.2 billion in punitive damages and \$766 million in compensatory damages.<sup>129</sup> As of the date of this Article, the plaintiffs were still attempting to collect the judgment after a court in the Philippines ruled that the money belonged to its government.<sup>130</sup> Similarly, in a case against the head of a nonstate organization responsible for the genocide in Rwanda, a district court awarded two groups of plaintiffs large sums of money: \$745 million and \$4.5 billion, respectively.<sup>131</sup> None of the money was ever collected.<sup>132</sup>

#### D. Dismissal Grounds

The grounds on which ATS and TVPA cases have been dismissed are not those predicted by some ATS commentators and do not reflect a hostility toward or an unwillingness to engage international law qua international law—at least pre-*Kiobel II*.<sup>133</sup> Rather, they suggest that courts have a relatively conservative interpretation of what international law norms mean and whether they apply to a given fact pattern.

Scholars such as Pamela Bookman discuss so-called transnational avoidance doctrines that enable courts to shunt cases on domestic law civil procedure doctrines before ever reaching questions of international law or foreign relations, which is properly the domain of the executive.<sup>134</sup> Bookman takes courts “at their word” in determining judicial attitudes toward transnational suits, coining the phrase “litigation isolationism” to explain that U.S. courts are reluctant to take on suits that she argues have very little to do with the United States.<sup>135</sup> Among other examples of

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129. *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996).

130. Vince Alvic & Alexis F. Nonato, *Victims of Human Rights Violations Under Marcos Ask Makati Court to Comply with Hawaii Judgment*, BUS. WORLD, July 2, 2015, at S1.

131. *Kadic v. Karadžić*, No. 93-cv-1163 (S.D.N.Y. Aug. 10, 2000) (awarding \$745 million to women who were raped during the Bosnian War); *Doe I v. Karadžić*, No. 93-cv-878 (S.D.N.Y. Sept. 25, 2000) (awarding \$4.5 billion to victims of rape, torture, and genocide during the Bosnian War).

132. Rachel Irwin, *Civil Actions Offer Some Closure for Bosnia Victims*, INST. FOR WAR & PEACE REPORTING (Apr. 26, 2011), <https://iwpr.net/global-voices/civil-actions-offer-some-closure-bosnia-victims> [<http://perma.cc/4FYV-A348>].

133. In part this may simply be due to the qualitative nature of the existing scholarship. Scholarly intuitions—including some of my own—are disproven by the data, which show a more nuanced landscape of dismissal doctrines. See *supra* note 23 (collecting scholarship).

134. See, e.g., Bookman, *supra* note 2, at 1084 & n.17, 1085 (collecting sources); see also *supra* note 23 (collecting scholarship).

135. Bookman, *supra* note 2, at 1085, 1089. Although Bookman’s piece is about transnational suits generally, transnational human rights and claims feature “perhaps most controversially” in her article. *Id.* at 1084. Bookman also makes no attempt to quantify how many cases she claims belong to each category within the broad umbrella of transnational suits. She lists, for example, suits against “U.S. manufacturers alleging that their airplanes crashed overseas due to propellers malfunctioning[,] . . . [suits] alleging that foreign-owned companies plotted securities fraud in the United States[,] . . . [and suits] alleging that foreign

transnational human rights litigation dismissed on the grounds of being “too foreign,” Bookman highlights a now-notorious ATS suit brought against Chevron (formerly Texaco) for dumping eighteen billion gallons of toxic waste into the Amazon Rainforest.<sup>136</sup> The case was dismissed to Ecuador by Judge Jed Rakoff of the Southern District of New York because it had “everything to do with Ecuador and nothing to do with the United States.”<sup>137</sup> Bookman identifies the most important transnational avoidance doctrines she believes are used to eliminate cases like these as personal jurisdiction, forum non conveniens, extraterritoriality, and “abstention comity.”<sup>138</sup> She also lists “the presumption against extraterritoriality, . . . forum selection clauses, comity, and the political question,” as well as “the act of state doctrine, standing, and the limited enforcement of treaties that are not self-executing” doctrines.<sup>139</sup> Professor Stephens takes a similar tack. Although in an earlier piece she acknowledges that immunity doctrines and failure to state a claim under the law of nations led to many dismissals,<sup>140</sup> in her seminal treatise, she isolates “political question, act of state, comity, ‘case-specific’ deference to the U.S. executive branch, and the foreign affairs doctrine” as some of the most important dismissal grounds.<sup>141</sup> At core, these latter doctrines are not merely instrumental means of terminating suits; they reflect judicial attitudes toward the ATS, and debates over the ATS “offer a unique window into the modern history of international law.”<sup>142</sup>

But the above doctrines are not, in fact, the primary means for dismissing transnational human rights suits—at least not pre-*Kiobel II*. As can be seen

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firms exported dangerous products to the United States that caused injury there” as other categories. *Id.* Given the hundreds of cases in the ATS and TVPA category, it is safe to assume they represent a large quantity of these cases.

136. Bookman, *supra* note 2, at 1100.

137. See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537–38 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002). I have engaged in advocacy work with the Ecuadorian plaintiffs in this case. Any views expressed are my own. For a more thorough discussion of the suit, see Kenney, *supra* note 4.

138. Bookman, *supra* note 2, at 1096 (quoting *Maxwell Commc’ns Corp. v. Societe Generale*, 93 F.3d 1036, 1047 (2d Cir. 2009)); see also *id.* at 1096 & n.94 (collecting cases).

139. Bookman, *supra* note 2, at 1084 n.17 (citations omitted).

140. Stephens, *supra* note 28, at 777.

141. STEPHENS ET AL., *supra* note 13, at 337. Stephens unequivocally states that immunity doctrines were featured heavily in recent years and that these reflect a conservative interpretation of international law. Stephens, *supra* note 13, at 1524. Nevertheless, Professor Stephens contends that these doctrines were not a principle means of dismissing ATS and TVPA suits before the George W. Bush Administration “because courts had little difficulty holding that the acts at issue . . . were not official acts and, therefore, that government officials were not entitled to immunity”—a statement that underestimates the importance of the immunity doctrines prior to the arrival of President George W. Bush. *Id.* Stephens’s position on the political question doctrine is also somewhat muddy. On the one hand, she explicitly lists it in her treatise as one of the arguments proffered in favor of dismissing transnational suits on the basis that foreign policy is the province of the executive. STEPHENS ET AL., *supra* note 13, at 337. On the other hand, she states that courts have almost universally rejected the political question doctrine as a means of dismissing ATS suits. *Id.* at 338–39.

142. Stephens, *supra* note 13, at 1467–70.

in Table 1, the most commonly used methods of dismissing ATS cases are failure to state a claim under the law of nations and immunity doctrines, in particular sovereign immunity.<sup>143</sup> As Part III discusses in greater detail, in dismissing a case for failure to state a claim under the law of nations, courts actively engage international law.<sup>144</sup> They grapple with what types of harms are protected under the principle of customary international law—where norms against the behavior in question are so strong as to create an international consensus that they are illegal—and whether the harms as alleged are severe enough to violate these norms. And, as Part III discusses in detail, immunity doctrines also are components of international law that reflect the principle that governments, sitting heads of state, and diplomats are sometimes exempt from civil jurisdiction in U.S. courts—and the domestic courts of most foreign countries—out of respect for reciprocity and communication in the international community.<sup>145</sup> Without such protections, the thinking goes, the international community would be unable to freely function because each nation's officials would constantly be sued by other countries for offenses they committed.<sup>146</sup> Of course, there are exceptions to such doctrines under international law, such as *jus cogens*, which provides certain norms cannot be derogated under any circumstances,<sup>147</sup> an argument that certain courts have adopted and that illustrates they do not uniformly engage in what Bookman labels “abstention comity.”<sup>148</sup> Indeed, figuring out the precise boundaries of these immunities, and under what circumstances they attach, is the bread and butter of international law, and it requires courts to understand and engage international law principles, not shun them due to suits' foreignness.

The above doctrines remained the two most prevalent means of dismissing these cases and were used approximately 35 percent and 27 percent of the time, respectively, over the entire time span analyzed. They remained prominent even during periods scholars might not expect them to be. For example, even after a 1989 Supreme Court decision held that the Foreign Sovereign Immunities Act<sup>149</sup> (FSIA) rendered sovereign states immune from suit unless the state met one of the statutorily codified

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143. Professor Stephens also asserts that suits brought under the ATS by non-aliens represent a statistically significant number of cases dismissed. *See id.* at 1448 & n.117. This dataset indicates that non-aliens only bring a fraction of cases. A far more statistically significant ground that Professor Stephens does not note are cases brought by pro se litigants who do not allege facts that support the causes of action they advance. Cases of this ilk—marked as “IPC” and “PS” in the dataset—are far more predominant.

144. *See, e.g., infra* Part III.

145. *See, e.g., infra* Part III; *see also* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 818 (2011).

146. Akande & Shah, *supra* note 145, at 818.

147. *Jus Cogens*, BLACK'S LAW DICTIONARY (10th ed. 2014).

148. *See infra* Part III.D.

149. 28 U.S.C. § 1602 *et seq.* (2012).

exceptions,<sup>150</sup> courts continued to invoke the doctrine of sovereign immunity against states and their instrumentalities.

As to the numerous doctrines Bookman and Professor Stephens invoke, *combined* they make up far fewer grounds of dismissal. Pre-*Kiobel II*, they represented an even smaller amount of all dismissals. Indeed, of all 220 cases dismissed, only six were dismissed on the ground of forum non conveniens—seven if counting *Aldana v. Del Monte Fresh Produce, N.A.*<sup>151</sup> twice. (After the courts of Guatemala refused to hear the case due to a “blocking statute,”<sup>152</sup> the plaintiffs attempted to return it to the forum that dismissed it to no avail.<sup>153</sup>) Similarly, only thirteen fully resolved cases were decided on the basis of raising a nonjudiciable political question, and most of these were decided on other grounds as well.<sup>154</sup> As to personal jurisdiction, most of these twenty dismissals were based on inadequate service of process rather than lack of contacts to the forum that would indicate “isolationism” or a refusal to apply international law.

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150. See generally *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989). See, e.g., *de Letelier v. Republic of Chile*, 488 F. Supp. 665, 671 (D.D.C. 1980) (“[A] foreign state is not entitled to immunity from an action seeking money damages ‘for personal injury or death . . . caused by the tortious act or omission of that foreign state’ or its officials or employees.”).

Note that this position does not reflect attempts to hold individuals liable as described in Part III.D.

151. 741 F.3d 1349 (11th Cir. 2014); 416 F.3d 1242 (11th Cir. 2008).

152. See M. Ryan Casey & Barrett Ristorph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. INT’L L. & MGMT. REV. 21, 27 (2007) (discussing “blocking statutes” employed by countries depriving their courts of jurisdiction to hear cases dismissed on a forum non conveniens basis from the United States or elsewhere).

153. *Aldana*, 741 F.3d at 1352.

154. A court in the Eastern District of Virginia recently dismissed an additional case on political question grounds, but that decision is being appealed. See *infra* note 367.

*Table 1: Dismissal Grounds by Year*

	Grounds of Dismissal	Number	Percent of Resolved <sup>(1)</sup>
1980-1992	Law of Nations	12	46%
	Immunity Doctrines <sup>(2)</sup>	9	35%
	Nonjusticiable Political Question	3	12%
	Other Grounds	7	27%
1992-1995	Immunity Doctrines <sup>(2)</sup>	5	71%
	Law of Nations	2	29%

Notes:

(1) Percent reflects all occurrences of grounds of dismissal per resolved case.

(2) Includes all immunity doctrines, including sovereign immunity, head-of-state immunity, diplomatic immunity, et cetera.

Table 1 continued

	Grounds of Dismissal	Number	Percent of Resolved <sup>(1)</sup>
1995-2004	Law of Nations	11	29%
	Immunity Doctrines <sup>(2)</sup>	7	18%
	Statute of Limitations	6	16%
	Personal Jurisdiction	3	8%
	No Private Right of Action	2	5%
	Nonjusticiable Political Question	2	5%
	Forum Non Conveniens	1	3%
	Other Grounds	8	21%
2004-2013	Law of Nations	41	37%
	Immunity Doctrines <sup>(2)</sup>	27	25%
	Personal Jurisdiction	11	10%
	Insufficiently Pled Complaint	8	7%
	Nonjusticiable Political Question	6	5%
	No Grounds Given	6	5%
	Not Natural Person	5	5%
	Other Grounds	28	25%

Notes:

(1) Percent reflects all occurrences of grounds of dismissal per resolved case.

(2) Includes all immunity doctrines, including sovereign immunity, head-of-state immunity, diplomatic immunity, et cetera.



Table 1 continued

	Grounds of Dismissal	Number	Percent of Resolved <sup>(1)</sup>
2013-2015	Presumption Against Extraterritoriality	16	38%
	Immunity Doctrines <sup>(2)</sup>	11	26%
	Law of Nations	6	14%
	Personal Jurisdiction	6	14%
	Other Grounds	20	48%

Notes:

(1) Percent reflects all occurrences of grounds of dismissal per resolved case.

(2) Includes all immunity doctrines, including sovereign immunity, head-of-state immunity, diplomatic immunity, et cetera.

Finally, for many years there was widespread handwringing over whether the ATS was purely jurisdictional such that it did not create a cause of action, and cases such as *Tel-Oren* reflected this trend.<sup>155</sup> Some scholars, especially Professors Curtis A. Bradley and Jack L. Goldsmith, argued that the ATS could not support suits for violations of the law of nations because only the political branches can incorporate customary international law into domestic law.<sup>156</sup> As *Sosa* established, the ATS *is* jurisdictional, but the cause of action is found in federal common law that incorporates customary international law.<sup>157</sup> And no empirical evidence supports the proposition that any significant number of non pro se cases, pre-*Sosa*, were dismissed because the ATS does not confer a private right of action, though several cases were dismissed because they relied on non self-executing treaties as evidence of the law of nations.<sup>158</sup> The only cases in the dataset falling into this category do so either because they rely on a non self-executing treaty

155. STEPHENS ET AL., *supra* note 13, at 27.

156. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 833–34 (1997).

157. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719, 724 (2004).

158. Only one non pro se case in the dataset was dismissed on the basis that the ATS did not create a cause of action pre-*Sosa*, but even this case did not explicitly rely on the ATS as a cause of action. See *White v. Paulsen*, 997 F. Supp. 1380, 1382, 1387 (E.D. Wash. 1998) (dismissing suit brought against prison physician, alleging in part that plaintiffs were subjected to nonconsensual medical experimentation while in custody in violation of international law's prohibition of crimes against humanity).

that was not well established enough to form a norm under customary international law or because plaintiffs attempted to invoke norms that were not sufficiently definite or universal.

### III. FINDINGS AND TRENDS OVER EACH TIME PERIOD

This part details the evolution of transnational human rights claims under the ATS and TVPA over time, summarizing the success rates and major doctrinal shifts over each period.

The data support three major takeaways. First, while the dismissal rate remained within the same 15 percent band, major doctrinal shifts occurred over time, such as the emergence of the presumption against extraterritoriality and the doctrine that corporations are not persons under international law. Second, the data illustrate not only that new dismissal grounds emerged, but also that shifts often occurred intra-doctrinally. In other words, judicial interpretations of the law of nations, sovereign immunity, and other existing dismissal grounds evolved, though occasionally in contradictory directions. Sometimes lower courts refused to follow the Supreme Court, and sometimes the Supreme Court actually proved helpful to plaintiffs when lower courts accepted new arguments against these cases. For example, even as lower courts ratcheted up the immunity afforded government officials, the Supreme Court checked that tendency. And even as the Supreme Court imposed the new territoriality requirement, at least some lower courts were quick to interpret it narrowly. Third, while the dismissal rates remained relatively constant, the data establish that plaintiffs increasingly diversified the identity of defendants, as suits moved from suits against individuals to suits against state instrumentalities to suits against private entities and corporations, which expanded the scope of ATS and TVPA liability.

While it is impossible to prove causality based on the dataset, these facts suggest that attempts to expand ATS and TVPA liability were not entirely successful. On the other hand, these facts suggest that plaintiffs' lawyers were able to circumvent the evolution and doctrinal shifts that occurred during some of these periods, including both post-*Sosa* and post-*Kiobel II*, by bringing cases that stood up to these shifts, or through effective pleading, or both.

#### A. From *Filártiga* to the TVPA

The early period of the ATS—largely considered the “honeymoon” phase by scholars<sup>159</sup>—was actually one in which plaintiffs experienced the lowest success rates.<sup>160</sup> One potential explanation is that courts were hostile

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159. Stephens, *supra* note 13, at 1469.

160. Until the passage of the TVPA in 1991, at least thirty-three nonfrivolous, non pro se ATS suits were fully resolved apart from *Filártiga*, and thirteen more were filed. Of these cases, only four were resolved in favor of the plaintiffs. Three cases have unknown end results, but the last recorded opinion in two of these indicates the ATS claims would likely have been dismissed. The remaining twenty-six cases were dismissed before even reaching

toward international law. Yet, the low success rate may be better explained by a judicial struggle to develop a workable definition of the law of nations, as well as a conservative interpretation of which actors could be sued. In the few cases where plaintiffs did prevail, they alleged harms similar to those in *Filártiga*, namely torture and extrajudicial killings, and sued state officials, forming the hallmarks of actionable ATS and TVPA claims today.

The biggest mark against the ATS and manifestation of hostility toward international law qua international law was *Tel-Oren*, which as noted was a suit against the PLO and other entities for the torture and death of many Israelis.<sup>161</sup> The per curiam section gave no reason for the decision.<sup>162</sup> However, Judge Bork argued in his concurrence that the ATS did not itself create a cause of action for violations of the law of nations.<sup>163</sup> He based this conclusion on the logic underlying the act of state doctrine<sup>164</sup> and the political question doctrine (derived from the former in the context of international law).<sup>165</sup> According to Judge Bork, while the act of state doctrine had originally been premised on “comity” and respect for the “sovereignty” of sister nations, it evolved into a separation of powers doctrine premised on a recognition that the judiciary has no institutional competence to intervene in foreign affairs, deemed within the province of the executive.<sup>166</sup> Congress or the President *could* have affirmatively authorized a private cause of action in a treaty or other agreement for plaintiffs to pursue under the ATS but did not.<sup>167</sup> To conclude otherwise would interfere with the executive’s design in enacting treaties or otherwise acceding to international law.<sup>168</sup> Judge Robb based his concurrence entirely on the political question doctrine, arguing that there were no judicial standards through which to assess the case nor was it the prerogative of the courts to intervene in matters of foreign affairs in which neither Congress nor the executive provided guidance for statutory construction.<sup>169</sup>

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the summary judgment stage, meaning at minimum courts terminated approximately 79 percent of all cases resolved during this period at the pleading stage. This is the highest rate of any of the five periods with the exception of post-*Kiobel II*. And during this time, the judgments favoring plaintiffs and the one settlement were relatively minor compared to what they would later amount to in dollar value. The highest dollar value amounted to approximately \$60 million, none of which was ever collected.

161. See *supra* notes 38–42 and accompanying text.

162. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

163. *Id.* at 801 (Bork, J., concurring).

164. *Id.* at 789 (Edwards, J., concurring) (“Where the Act of State Doctrine applies, the Supreme Court has directed the courts not to inquire into the validity of the public acts of a recognized foreign sovereign committed *within its own territory* . . . . The doctrine does *not* require courts to decline jurisdiction, as does the Foreign Sovereign Immunities Act, but only not to reach the merits of certain issues.” (internal citation omitted)).

165. *Id.* at 800.

166. *Id.* at 802.

167. *Id.* at 814–19.

168. *Id.*

169. *Id.* at 823 (Robb, J., concurring).

Although *Tel-Oren* prompted massive scholarly commentary, it was an island doctrinally speaking. No other case during this time period struck down ATS claims on Judge Bork's logic or, for that matter, Judge Robb's, however compelling they may have been to scholars or officials in the Reagan Administration. The real hostility toward ATS cases was likely a result of their novelty. Judges and parties had rarely grappled with the statute before and, as such, knew very little about what to do with it. Historically it had only been applied to a narrow array of cases, for example, those related to ambassadors.<sup>170</sup> After *Filártiga*, both individual victims of human rights abuses and corporations contended that defendants violated their rights under the law of nations. Because many of these fact patterns, as well as the categories of the parties who brought them or were sued under them, differed in kind from *Filártiga*, courts were left without much guidance on a number of questions.

*Filártiga* did not define what constituted the law of nations, except to say that it "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>171</sup> In applying this methodology, courts adopted a narrow definition of the phrase, rejecting claims based on torts such as negligence,<sup>172</sup> conversion,<sup>173</sup> expropriation of property,<sup>174</sup> and fraud,<sup>175</sup> even when the facts suggested potential human rights violations such as failure to protect from political violence or confiscation of property during a dictatorship. Other claims that courts deemed not to violate the law of nations included abuses of free speech<sup>176</sup> and environmental law treaties.<sup>177</sup> At least one court ruled that

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170. See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 492–93, 492 n.143, 494 n.152 (1986).

171. *Filártiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

172. See, e.g., *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989) (holding plaintiff's complaint that Sudan was negligent in failing to warn the plaintiff's family of "imminent political danger and violence and failing to provide adequate police protection and security" did not state a claim under the law of nations and that the plaintiff failed to allege alien status).

173. See, e.g., *Cohen v. Hartman*, 634 F.2d 318, 320 (5th Cir. 1981) (holding that Canadian citizen who alleged his employee converted his funds did not state a claim under the law of nations).

174. See, e.g., *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 210 (N.D. Ill. 1982) (dismissing Iranian nationals' suit against the government of Iran to recover money for allegedly wrongful expropriation of their property on the grounds that Iran's actions did not violate any U.S. treaty, and the law of nations does not prohibit a government's expropriation of the property of its own nationals).

175. See, e.g., *Trans-Continental Inv. Corp. v. Bank of Commonwealth*, 500 F. Supp. 565, 570 (C.D. Cal. 1980) (holding that allegations by a foreign company against Michigan bank and its controlling persons for fraud was not a violation of the law of nations).

176. See, e.g., *Guinto v. Marcos*, 654 F. Supp. 276, 278, 280 (S.D. Cal. 1986) (holding that seizure of Philippine citizens' film did not rise to the level of a violation of a universally recognized right, but also that the act of state doctrine immunized the government from suit).

while causing “disappearances” during a military dictatorship was a violation of the law of nations, “cruel, inhuman, and degrading treatment” during the same was not, despite the corpus of treaty law surrounding the issue.<sup>178</sup> And Judge Edwards in *Tel-Oren* found the allegations that the PLO tortured and killed Israelis similar to those of *Filártiga* and therefore theoretically actionable, but distinguished the case on the ground that nonstate entities could not be held liable for torture under international law, otherwise the crimes simply amounted to assault.<sup>179</sup> Judge Edwards also argued that politically motivated terrorism, “no matter how repugnant it might be,” was not a violation of the law of nations given the lack of consensus in the international community condemning it.<sup>180</sup>

There were many other cases where violations of the law of nations might have been established, and yet claims were still dismissed. The second most important means of dismissing early ATS cases was sovereign immunity, a doctrine that was not deployed against officials themselves, but against states. Nine cases were dismissed based on sovereign immunity, with three suits against the U.S. government<sup>181</sup> and two more against its agents.<sup>182</sup> The underlying rationale for these dismissals was that the United States cannot be sued unless it consents to such a suit and that the ATS does

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177. See, e.g., *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (holding plaintiffs’ suit for shipment of contaminated copper did not rise to a violation of the law of nations because the defendant had violated no treaty).

178. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (holding claims for “cruel, inhuman, and degrading treatment” did not amount to violations of the law of nations because the tort was not universally “definable,” i.e., it could encompass many different types of treatment). This Article counts *Forti* as a “success” because the second amended complaint resulted in a default judgment for the plaintiff. *Id.* Nevertheless, the opinion illustrates the narrow definition of the Law of Nations some courts crafted after *Filártiga*.

179. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1914) (Edwards, J., concurring).

180. *Id.* at 795–96.

181. *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (dismissing suit by Panamanian businesses for looting in the wake of invasion of Panama); *Lloyd’s Syndicate 609 v. United States*, 917 F.2d 1552, 1553 (11th Cir. 1990) (dismissing suit arising out of many laws, including the ATS, for aircraft that was destroyed during fighting in Panama against the United States); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (dismissing suit under the ATS for refusal to permit a vessel to enter a port on the ground of risk to national security).

182. *Adras v. Nelson*, 917 F.2d 1552, 1557 (11th Cir. 1990) (dismissing suit by Haitian refugees detained after their entry for their unlawful detention and treatment received in a detention center); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 204–05 (D.C. Cir. 1985) (dismissing suit brought against the U.S. President and other federal defendants alleging they provided “financial, technical, and other support to anti-Nicaraguan terrorist groups” that “carried out scores of attacks on upon innocent” civilians that “resulted in summary execution, murder, abduction, torture, rape, wounding, and destruction of private property and public facilities” on the grounds of sovereign immunity as well as the political question doctrine (citation omitted)). The last case, *Bennett v. Stephens*, No. 88-Civ-2610, 1989 WL 17751 (D.D.C. Feb. 23, 1989), which dealt with a woman who believed the government was transmitting radio waves into her body, was nominally decided on the grounds of sovereign immunity even though it could well be deemed frivolous. *Id.* at \*4.

not function as a waiver or as consent.<sup>183</sup> Dismissal on this ground may have, in large part, been due less to the importance of the immunity accorded foreign countries than to a desire to protect our own government. Later periods suggest this reasoning may be motivating this doctrinal development because courts later held that U.S. *officials* could not be sued though foreign officials could be. Of the cases against non-U.S. defendants, all three were brought against foreign governments (the Soviet Union,<sup>184</sup> Saudi Arabia,<sup>185</sup> and Argentina<sup>186</sup>). The Supreme Court effectively ended all litigation under the ATS against foreign states in *Argentine Republic v. Amerada Hess Shipping Corp.*<sup>187</sup> This decision held that jurisdiction over foreign states must be predicated solely on the FSIA—a statute passed in 1976 that provides statutory immunity to foreign states unless one of the exceptions applies (e.g., for commercial activities or for state torts committed within the territory of the United States).<sup>188</sup>

Other individual grounds of dismissal during this time period include individual cases dealing with inadequate service of process,<sup>189</sup> the political question doctrine,<sup>190</sup> and standing.<sup>191</sup> For these latter two grounds, the

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183. Under the Foreign Sovereign Immunities Act, “[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which the foreign state has waived its immunity either explicitly or by implication.” 28 U.S.C. § 1605(a)(1) (2012); *see also infra* notes 188–91.

184. *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1, 8 (D.D.C. 1990) (holding that a guardian of a Swedish diplomat’s suit against Soviet Union for the diplomat’s unlawful seizure, subsequent imprisonment, and possible death was barred by sovereign immunity).

185. *Nelson v. Saudi Arabia*, No. 88-Civ-1791, 1989 WL 435302, at \*1, \*4 (S.D. Fla. Aug. 11, 1989) (dismissing suit brought by systems engineer against Saudi Arabia for being “shackled, tortured, and beaten” while he was detained by Saudi Arabia after making reports of safety violations), *rev’d on other grounds*, *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1530 (11th Cir. 1991), *rev’d on other grounds*, 507 U.S. 349 (1993), *vacated on other grounds*, 996 F.2d 270 (11th Cir. 1993).

186. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 431 (1989) (dismissing suit brought by Liberian corporation against Argentina for bombing its oil tanker on the high seas during the Falklands War).

187. 488 U.S. 428 (1989).

188. *Id.* at 431; 28 U.S.C. § 1605(a). Prior to *Amerada Hess*, one court had handed down a default judgment against the Republic of Chile for a car bombing during the military dictatorship of Augusto Pinochet that killed both the Chilean ambassador and foreign minister to the United States while they were in Washington, D.C., en route to a meeting. *de Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980) (holding that such conduct constituted a violation of international law and that FSIA did not apply); Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by U.S. Courts*, 15 HUM. RTS. Q. 207, 208 n.5 (1993) (reporting the damages were jointly assessed by the Chilean-U.S. Commission at \$5,062,854.97).

189. *See, e.g., Carmichael v. United Techs. Corp.*, 835 F.2d 109, 115 (5th Cir. 1988) (dismissing British national’s suit against various businesses under the ATS for his imprisonment and torture in Saudi Arabia for inadequate service of process as to all but one, and holding that there was no evidence to substantiate the remaining defendants’ involvement).

190. *See, e.g., Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1340 (S.D.N.Y. 1984) (holding that suit injunction against the deployment of cruise missiles in a town in England where a U.S. Air Force base was located raised a nonjusticiable political question). *But see Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1512 (D.C.

courts expressed discomfort interfering with foreign policy decisions made by the coordinate branches of government—such as the decision to invade a foreign country or to act in the interests of national security—rather than with the executive's desire not to deem the judiciary of a sister sovereign corrupt or otherwise unable to dispense justice. That is to say, these doctrines have mostly come into play when the United States is a defendant rather than amicus or an intervenor (e.g., if the State Department submits a letter requesting or objecting to dismissal).<sup>192</sup> As such, these doctrines arguably are not hostile toward international law or the foreignness of such lawsuits. Another ground was the heads of state doctrine, which provides that *current* foreign heads of state cannot be liable for actions taken in their official capacity.<sup>193</sup>

Plaintiffs prevailed in the four remaining cases, which alleged harms that went far beyond commercial torts and resembled the fact pattern in *Filártiga*—gruesome torture and extrajudicial killing. Three of these suits were filed against the same foreign officer who acted under color of state law during Argentina's Dirty War.<sup>194</sup> This trilogy was important because it established new means for defendants to be held liable for actions they did not personally commit on the basis of "command responsibility" and helped establish that the head-of-state immunity doctrine did not apply to *former* members of government. Over \$89 million was collectively awarded in these cases, of which only \$1000 was ever dispersed.<sup>195</sup>

### B. From the TVPA to Kadic

Perhaps this period should more rightly be deemed the "honeymoon" of the ATS and the TVPA. From the passage of the TVPA on March 12, 1992, until *Kadic v. Karadžić* on October 13, 1995, outcomes for plaintiffs were far more favorable—at least in terms of judgments and nondispositive opinions that paved the way for future large recoveries. Plaintiffs prevailed

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Cir. 1984) (holding that suit against U.S. occupation of Honduran farmers' land did not raise a political question).

191. *De Arellano v. Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (holding that Honduran farmers whose land was illegally occupied by a U.S. military training center had cause of action under the ATS, but that because the occupation was in practical terms over, there was no standing to issue an injunction).

192. See Stephens, *supra* note 28, at 793 & n.109 (discussing the Department of State's letter in a case involving Exxon and the Indonesian military).

193. See Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (discussing the act of state doctrine).

194. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 708–09 (N.D. Cal. 1988), No. 87-cv-2058 (N.D. Cal. Apr. 20, 1990) (awarding \$8,000,000); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 SC, 1988 U.S. Dist. LEXIS 19470, at \*9–10 (N.D. Cal. Apr. 22, 1988) (default judgment for \$21,170,699). Although no record exists of the subsequent proceedings in Westlaw, Lexis, or Bloomberg Law or for the last case, a source reports that default judgments were awarded. See Lillich, *supra* note 188, at 207 n.4 (citing *Quiros de Rapaport v. Suárez-Mason*, No. 87-cv-2266 (N.D. Cal. Apr. 11, 1989) (awarding \$60,004,852)). The defendant was also extradited to Argentina to face criminal charges. *In re Extradition of Suarez-Mason*, 694 F. Supp. 676, 679 (N.D. Cal. 1988).

195. Sandra Coliver, *Bringing Human Rights Abusers to Justice in U.S. Courts: Carrying Forward the Legacy of the Nuremberg Trials*, 27 CARDOZO L. REV. 1689, 1697 (2006).

approximately 36 percent of the time out of the eleven cases that were fully resolved during this period, winning three default judgments<sup>196</sup> and hammering out one large settlement.<sup>197</sup> Unfortunately, none of the judgments, which amounted to \$81.5 million collectively, was ever collected.<sup>198</sup>

These victories rejected several strands of jurisprudence hostile toward the application of international law, even, for example, the argument eventually accepted by *Kiobel II* that the ATS did not apply extraterritorially, as well as Judge Bork's argument that the ATS did not confer a private right of action. The cases pushed back against the new argument that defendants were protected by the act of state doctrine if their acts were official. The victories also crystallized new actionable human rights violations committed by officials—whether committed in the course of their duties or not. Despite victories, the majority of judgments during this time period were resolved in favor of defendants on the basis of sovereign immunity, for the most part not due to any doctrinal developments but rather to a time lag after *Amerasia Hess*.

First, two victories for plaintiffs upheld a new basis for liability beyond torture and extrajudicial killing: cruel, inhuman, and degrading treatment. The plaintiffs in a consolidated case brought under the ATS and TVPA, *Xuncax v. Gramajo*,<sup>199</sup> alleged that the former Defense Minister of Guatemala, Hector Gramajo, forced them to flee Guatemala after the military “ransacked their villages” and murdered, tortured, and falsely imprisoned them or their family members.<sup>200</sup> In the most egregious example, one of the plaintiffs was forced to watch as soldiers mutilated his father's chest, back, and arms; shot him in the legs; and threw him into a hole filled with “burning mattresses and cardboard.”<sup>201</sup> He saw his father's burnt body, and when he returned home, his house was incinerated “and his

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196. *Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass. 1995) (case against Guatemalan Minister of Defense); *Todd v. Panjaitan*, No. 92-Civ-12255, 1994 WL 827111, at \*1 (D. Mass. Oct. 26, 1994) (case against Indonesian general awarding \$14 million to plaintiff and also upholding liability on theory of command responsibility in the civil context); *Paul v. Avril (Paul I)*, 812 F. Supp. 207, 209 (S.D. Fla. 1993) (case against the former head of the Haitian military).

197. *Siderman de Blake v. Argentina*, 965 F.2d 699, 703 (9th Cir. 1992) (case against Argentina for kidnapping, torture, arbitrary detention, and forcible exile where sovereign immunity was waived by Argentina's actions in related proceedings; the case settled for \$6 million).

198. *Todd*, No. 92-cv-12255 (D. Mass. Nov. 14, 1994) (docket entry noting failed service of judgment); Email from Bob Corbett to Haiti Mailing List (May 30, 2001, 02:49 CDT), <http://faculty.webster.edu/corbette/haiti-archive/msg07862.html> [hereinafter Corbett Email] (explaining the *Paul* judgment had, to date, not been enforced, but speculating that two plaintiffs received private payments) [<http://perma.cc/EQS4-CRD7>]; see *infra* note 204.

199. 886 F. Supp. 162 (D. Mass. 1995) (consolidating Nos. 91-cv-11564 and 91-cv-11612).

200. *Id.* at 169–79. The plaintiffs also sued under Guatemalan, state, and municipal tort law, and damages were considered on these bases as well. *Id.* at 200–02.

201. *Id.* at 170.



mother and sibling [were] gone.”<sup>202</sup> The court held that certain allegations (such as forcing plaintiffs to witness the torture of family members) supported a claim of cruel, inhuman, and degrading treatment.<sup>203</sup> The court awarded the plaintiffs \$45.5 million, though the money was never collected.<sup>204</sup>

The second case, *Paul v. Avril*,<sup>205</sup> involved a cause of action for cruel, inhuman, and degrading treatment and was brought by six prominent opposition leaders to the Haitian dictatorship. Among other things, they “ha[d] lit cigarettes inserted in[to] the[ir] nostrils, [were] put in contortionistic positions while beaten with particular attention being paid to the skull and groin . . . [were] deliberate[ly] starv[ed],” and were “paraded on national television and falsely accused of being involved in an assassination plot.”<sup>206</sup> They sued Prosper Avril, the former head of the Haitian military, for torture, cruel and inhuman treatment, and other crimes.<sup>207</sup> The court awarded a judgment of \$41 million to the six plaintiffs.<sup>208</sup> None of the money was collected.<sup>209</sup>

The victories also rejected some of the arguments proffered against the application of international law. In *Paul*, the defendant argued that there was no subject matter jurisdiction over suits between foreign plaintiffs against foreign defendants for acts arising outside of the United States; that following Judge Bork’s opinion in *Tel-Oren*, the ATS did not give rise to a cause of action; and, finally, that the act of state and political question doctrines barred the suit.<sup>210</sup> The court rejected each of these arguments in turn. It held that the text of the ATS, as well as surrounding precedent, made the statute applicable to “foreign cubed” cases—namely, cases brought by aliens against other aliens for conduct occurring abroad.<sup>211</sup> It held that Judge Edward’s concurrence in *Tel-Oren*, which agreed with *Filártiga*, was the correct interpretation of the cause of action question.<sup>212</sup> And it finally held that the acts at issue did not qualify as “official public acts,” but instead as acts taken purely under “color of law”—and therefore

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202. *Id.* In the second action, a missionary was “kidnapped, tortured[,] and subjected to sexual abuse in Guatemala by personnel under Gramajo’s command.” *Id.* at 173. She sued under the TVPA. *Id.* at 176.

203. *Id.* at 185–89. One of the plaintiffs claimed “constructive expulsion” from Guatemala. *See id.* at 189. The court ruled this did not constitute a violation of the law of nations. *Id.*

204. *Id.* at 198–99 (calculating damages under the ATS and TVPA). The court awarded an additional \$2 million in damages under Kentucky law. *Id.* Gramajo refused to pay. *Xuncax v. Gramajo and Ortiz v. Gramajo*, CTR. FOR CONST. RTS. (Oct. 9, 2007), <http://ccrjustice.org/past-cases/xuncax-v.-gramajo-and-ortiz-v.-gramajo> [http://perma.cc/93VD-K7JG].

205. 812 F. Supp. 207 (S.D. Fla. 1993).

206. *Id.* at 209.

207. *Id.*

208. *Paul v. Avril (Paul II)*, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (awarding damages after the defendant failed to appear).

209. *See Corbett Email*, *supra* note 198.

210. *Paul I*, 812 F. Supp. at 209.

211. *Id.* at 211–12.

212. *Id.* at 210–19.

the last two doctrines did not apply.<sup>213</sup> Similarly, in *Xuncax*, the court addressed Judge Bork's and Judge Edward's concurrences in *Tel-Oren* and held that the TVPA ratified *Filártiga*'s approach to the ATS and that the ATS was not simply jurisdictional, but also enabled plaintiffs to sue for "harms [that] were committed upon them in violation of international law or a treaty of the United States."<sup>214</sup>

Two other cases not fully resolved during this period produced very important opinions dealing with some of the same questions. A case against the former dictator of the Philippines, Ferdinand Marcos, and his daughter, Imee Marcos-Manotoc, who oversaw military intelligence, produced a default judgment against Marcos-Manotoc (who failed to appear) for the kidnapping, torture, and death of a student based on his political beliefs.<sup>215</sup> A district court in Hawai'i awarded his mother \$4.16 million in damages and attorneys' fees under Philippine law.<sup>216</sup> The Ninth Circuit considered whether Marcos-Manotoc was entitled to sovereign immunity under the FSIA; whether the ATS did not apply extraterritorially; and whether the ATS was "purely . . . jurisdictional" in nature.<sup>217</sup> It answered "no" to each, reasoning that the acts in question exceeded the scope of Marcos-Manotoc's official authority; that the ATS on its face could be applied to foreign defendants and there was no limitation as to the "locus of the injury"; and that the ATS recognized municipal torts and thus was not purely jurisdictional.<sup>218</sup> Meanwhile, the Ninth Circuit consolidated this case with other cases brought against Marcos and certified a class action against his estate, because at that point the dictator had died.<sup>219</sup> The plaintiffs moved to freeze Marcos's assets, and the district court complied.<sup>220</sup> The Estate appealed.<sup>221</sup> While the preliminary injunction was on appeal, the district court brought the case to trial, and a jury voted on February 13, 1994, in favor of the class and awarded the plaintiffs \$1.2 billion in exemplary damages and \$766 million in compensatory

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213. *Id.*

214. *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995).

215. *In re Estate of Ferdinand E. Marcos Human Rights Litig. (Estate I)*, 978 F.2d 493, 495–96 (9th Cir. 1992).

216. *Id.* at 496; *Trajano v. Marcos*, Nos. 86-Civ-2448, 86-Civ-15039, 1989 WL 76894, at \*2 (9th Cir. Jul. 10, 1989) ("Marcos is a private citizen residing in the United States. Neither the present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government. The issues raised, although extraordinarily complex, are within the capacity of the courts to resolve.").

217. *Estate I*, 978 F.2d at 501.

218. *Id.* at 500. Marcos-Manotoc also made the argument that the extraterritorial application of the ATS violated Article III of the U.S. Constitution. *Id.* at 501–03. The Ninth Circuit rejected this argument, holding that the "Arising Under" Clause was meant to encompass foreign cases and that the United States has the power to incorporate international law as part of domestic law. *Id.* at 499–503.

219. *In re Estate of Ferdinand Marcos Human Rights Litig. (Estate II)*, 25 F.3d 1467, 1469 (9th Cir. 1994).

220. *Id.*

221. *Id.*

damages.<sup>222</sup> The Ninth Circuit, in considering the interlocutory appeal of the injunction, reached the same conclusions on all of the issues in the challenge to the default judgment made by Marcos-Manotoc.<sup>223</sup>

The remaining cases were dismissed on various grounds, mostly on the basis of sovereign immunity, though three of these suits were brought against the United States or an officer of the United States.<sup>224</sup> The final case, *Lafontant v. Aristide*,<sup>225</sup> was dismissed on the basis of head-of-state immunity in a manner that suggested a quite conservative approach to international law, if not hostility toward it. There, Lafontant attempted to prevent the newly elected Haitian President, Jean-Bertrand Aristide, from taking office.<sup>226</sup> After the coup failed and Lafontant was jailed, a member of the Haitian military executed him, allegedly on the orders of President Aristide.<sup>227</sup> Two days later, another military coup succeeded, and Aristide sought refuge in the United States, which continued to recognize him as Haiti's president.<sup>228</sup> Lafontant's widow sued, and Aristide moved to dismiss the case on the ground that, as a sitting head of state, he was immune from suit.<sup>229</sup> The Department of Justice submitted a statement to the court that it would be contrary to then-U.S. foreign policy to hold him accountable for the violations that occurred.<sup>230</sup> The court held that based on principles of comity—which permitted individuals like Prince Charles to avoid prosecution while in the United States—Aristide should be protected from liability under both the ATS and the TVPA.<sup>231</sup> The only means of overcoming such immunity would be if the foreign state itself did not recognize the leader as the legitimate head of state or if the U.S. executive branch similarly recognized the leader as illegitimate.<sup>232</sup> Such was not the situation here.<sup>233</sup> Finally, two other courts granted motions to dismiss on

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222. *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996).

223. *Estate II*, 25 F.3d at 1470–76.

224. *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967 (4th Cir. 1992) (dismissing claims against the United States for failing to provide adequate police protection to civilians during its occupation of Panama, which “damage[d] . . . the property of various Panamanian businesses that occurred as a result of looting and rioting in the wake” of the invasion); *Koohi v. United States*, 976 F.2d 1328, 1329–31 (9th Cir. 1992) (dismissing case against the United States for misidentifying and shooting down a civilian aircraft during a conflict with Iran, killing 290 people); *Smith v. Olsen*, 76 A.F.T.R.2d 95-6478 (D. Ariz. 1995) (dismissing suit for IRS's attempt to collect taxes from a nonresident alien under various statutes, including the ATS); *Denegri v. Republic of Chile*, No. 86-Civ-3085, 1992 WL 91914, at \*1, \*4 (D.D.C. Apr. 6, 1992) (dismissing suit against Chile for detaining two teenagers, dousing them with gasoline, setting them on fire, and denying them adequate medical treatment).

225. 844 F. Supp. 128 (E.D.N.Y. 1994).

226. *Id.* at 130.

227. *Id.*

228. *Id.*

229. *Id.* at 130–31.

230. *Id.* at 131.

231. *Id.* at 131–32, 137–39.

232. *Id.* at 132–33. The court further held that the FSIA did not alter head-of-state immunity. *Id.* at 137.

233. *Id.* at 134.

the basis of failure to state a claim under the law of nations,<sup>234</sup> and two dismissed ATS cases for undetermined reasons.<sup>235</sup>

Of course the case of most importance during this period—which marked a sea change in how ATS cases came to be litigated—was the Second Circuit’s unanimous opinion in *Kadic*. The Second Circuit consolidated cases brought by two groups of plaintiffs alleging that the President of the self-proclaimed and unrecognized Bosnian-Serb country of “Srpska” controlled military forces that committed “genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.”<sup>236</sup> The Second Circuit held that individuals who were not state officials or acting under color of state law were capable of being held liable under the ATS—at least for certain violations of the law of nations.<sup>237</sup> Harmonizing its opinion with Judge Edwards’s concurrence in *Tel-Oren*, which stated that there are a “handful of crimes to which the law of nations attributes individual responsibility,”<sup>238</sup> the court broke the allegations into three categories: “(a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.”<sup>239</sup> It concluded that international law dating back to at least World War II prohibited genocide and war crimes not only by state actors, but also by private actors.<sup>240</sup> It stated that prohibitions against torture under the law of nations applied only to state officials or actors acting under color of law.<sup>241</sup> The court also rejected Karadžić’s argument that the claims were nonjusticiable under the political question or act of state doctrine and, at the behest of the United States, considered the possibility of a dismissal based on forum non conveniens.<sup>242</sup> It concluded: “[T]he courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs’ claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs’ preference for a United States

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234. *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417–18 (9th Cir. 1995) (holding that the misrepresentation of the bank’s financial health and insider “looting” of funds did not amount to breaches of the law of nations); *Bagguley v. Matthews*, No. 88-Civ-3486, 1992 WL 160945, at \*3 (D. Kan. June 3, 1992) (dismissing claims that an alien prisoner’s due process rights had been violated because his request to serve his sentence in the United Kingdom was denied on the ground that he failed to allege a treaty violation).

235. The cases that were dismissed for undetermined reasons were *Castillo v. Spiliada Mar. Corp.*, 937 F.2d 240 (5th Cir. 1991), which reversed and remanded the dismissal wage claims brought by Filipino sailors against their former employer, *see Castillo v. Spiliada Mar. Corp.*, 732 F. Supp. 50 (E.D.N.Y. 1991), and *Jaffe v. Giles*, 616 F. Supp. 1371 (W.D.N.Y. 1985), which dismissed claims that an individual was allegedly kidnapped in Canada and returned to the United States for trial.

236. *Kadic v. Karadžić*, 70 F.3d 232, 237 (2d Cir. 1995).

237. *Id.* at 236–39.

238. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring).

239. *Kadic*, 70 F.3d at 241.

240. *Id.* at 241–43.

241. *Id.* at 243.

242. *Id.* at 250–51.

forum.”<sup>243</sup> The court thus demonstrated a high willingness to engage international law and was quite liberal in its interpretation of it.

### C. From *Kadic* to *Sosa*

The period from the Second Circuit’s opinion in *Kadic* until the Supreme Court’s decision in *Sosa* was characterized by a lower rate of success for plaintiffs in terms of judgments obtained against individuals, but also by a rise in suits against corporations.<sup>244</sup> However, judicial resolutions of suits against corporations and private entities were not reflected in new dismissal doctrines. In fact, there were few significant developments in these doctrines until *Sosa* itself. Courts still grappled with which harms were actionable under the law of nations, forming an enlarged list, albeit one with some surprising exceptions. Sovereign immunity continued to be another principal means of dismissal. Some decisions on this ground demonstrated reluctance to interfere with foreign affairs, treating it as the province of the executive. Nevertheless, the United States was usually a *party* to these actions rather than an amicus or intervenor attempting to prevent U.S. courts from sitting in judgment on foreign officials, including ex-heads of state. As such, these decisions only indicate a desire to protect the government from actions initiated by aliens rather than a reluctance to engage human rights abuses abroad because they had nothing to do with the United States and were too “foreign.” One wrinkle that emerged during the post-*Kadic* period, likely a hangover from the passage of the TVPA, was the insertion of certain TVPA requirements into the ATS. Theoretically, this could be read as manifesting “isolationism,” but it better reflects the rise of textualism trickling down from the Supreme Court and the perceived importance of preemption.

The most important factor for dismissal during this period, like 1980 to 1992, but unlike 1992 to 1995, was the type of harm alleged by the plaintiff and exactly how egregious it was. Among the cases thrown out under the law of nations limitation, a few types are intuitive—for example, those alleging antitrust violations, in particular price-fixing,<sup>245</sup> or alleging

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243. *Id.*

244. During the post-*Kadic* period, there were sixty-one fully resolved ATS and TVPA suits and many additional pending cases. Out of these sixty-one cases, thirty-five (approximately 57 percent) were dismissed on a motion to dismiss with prejudice. Three more were dismissed without prejudice; two more appear to have settled on non-ATS grounds. Two cases resulted in summary judgment for the defendants. Two jury trials issued verdicts for the defendants. Seven cases settled. Four cases resulted in default judgments. Five juries ruled for plaintiffs. The result of one remaining case is unclear, but it seems it may have settled. This is an overall win rate of approximately 76 percent, excluding judgments that were never enforced and cases with unknown outcomes.

245. *See, e.g.,* *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. 01-Civ-686, 2001 WL 761360, at \*1 (D.D.C. June 7, 2001) (dismissing ATS claims for conspiracy to fix prices), *rev’d and vacated on other grounds*, 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004), *aff’d*, 417 F.3d 1267 (D.C. Cir. 2005); *Kruman v. Christie’s Int’l PLC*, 129 F. Supp. 2d 620, 627 (S.D.N.Y. 2001), *aff’d in part, vacated in part, remanded*, 284 F.3d 384 (2d Cir. 2002).

violations of domestic statutes such as the Civil Rights Act of 1964 or the Fair Labor Standards Act<sup>246</sup> (FLSA). More significantly, courts rejected allegations of environmental destruction or health scourges caused by massive pollution—even if these harms resulted in wide-scale displacement of communities or destruction of indigenous culture—because such norms were deemed either insufficiently definite or insufficiently universal to qualify.<sup>247</sup> And, as in other periods, at least one case was dismissed based on allegations that it resulted in property loss.<sup>248</sup> Cases that were not dismissed on this ground were based, for example, on acts of torture, extrajudicial killing, arbitrary detention, war crimes (surprisingly, including expropriation of property),<sup>249</sup> or forced labor.

Another important means of dismissal was that of sovereign immunity. Three of the five cases dismissed on this ground were brought against sovereign states: the United States,<sup>250</sup> Israel,<sup>251</sup> and Iran.<sup>252</sup> A sixth additional case considered a novel argument, presented in a suit against Libya for its role in the suitcase bombing of Pan Am Flight 103 over Lockerbie, that a *jus cogens* violation “constitute[d] an implied waiver within the meaning of the FSIA.”<sup>253</sup> The suit was not premised under the ATS—as many of its victims were U.S. citizens—but drew on the analogy to *Kadic*.<sup>254</sup> The plaintiffs alleged that because a *jus cogens* norm, such as a norm against extrajudicial killing, is a mandatory norm “recognized by the international community as a norm from which no derogation is

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246. See, e.g., *Wong-Opasi v. Tenn. State Univ.*, Nos. 99-5658, 99-5660, slip. op. at 2 (6th Cir. Aug. 16, 2000) (dismissing ATS claims that plaintiff’s employer underpaid her, denied her tenure, and then dismissed her); *Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299, 301 (E.D. La. 2001) (dismissing discrimination claims based primarily on Title VII that plaintiff bolstered by claiming the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on Civil Rights created a norm under the law of nations), *aff’d*, 33 F. App’x 705 (5th Cir. 2002).

247. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254 (2d Cir. 2003) (holding in another mining case that the “‘right to life’ and ‘right to health’ [were] insufficiently definite to constitute rules of customary international law”); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (holding that Indonesian citizens’ claims against mining company for environmental destruction did not rise to a violation of the law of nations because environmental rights are not universal and sovereigns have a right to impose their own environmental laws).

248. *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004) (dismissing French citizen’s suit over ownership rights in Peruvian gold mine).

249. Two cases alleging expropriation of property were dismissed on sovereign immunity grounds, one on the political question doctrine, and one settled. Notably, of these, three claims involved Nazi confiscation of property that belonged to Jews during the Holocaust.

250. *U-Series Int’l Servs., Ltd. v. United States*, No. 94-Civ-2733, 1995 WL 671567, at \*1, \*3 (S.D.N.Y. Nov. 7, 1995) (dismissing ATS as basis for jurisdiction over suit against United States challenging civil forfeiture of electronics equipment).

251. *Hirsh v. State of Israel*, 962 F. Supp. 377, 385 (S.D.N.Y. 1997) (dismissing Holocaust survivors’ claims against Germany for redress due to them under treaty), *aff’d*, 133 F.3d 907 (2d Cir. 1997).

252. *Soudavar v. Islamic Republic of Iran*, 67 F. App’x 618, 619–20 (D.C. Cir. 2003) (dismissing suit against Iran over transfer of real estate).

253. *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996).

254. *Id.* at 241.

permitted,” no immunity by definition can attach.<sup>255</sup> The Second Circuit rejected this argument based on its interpretation of Congress’s intent in drafting the FSIA.<sup>256</sup> Another suit brought against a Chinese official for the Tiananmen Square massacre was dismissed on sovereign immunity grounds as the result of the Department of State’s diplomatic arm-twisting. A judge in the Southern District of New York initially found that service of process was complete when the papers were served on a member of the Department of State’s security detail assigned to protect the official after the court issued an order requiring the Department of State to serve the defendant.<sup>257</sup> But the Department of State never did so and afterward asserted that the order violated the U.S. government’s sovereign immunity.<sup>258</sup> Another judge in the same district agreed.<sup>259</sup> Finally, in a complicated case that involved many defendants both public and private in the context of Chinese prison camps where Chinese citizens were allegedly slaves, a district court in the District of Columbia ruled that the Bank of China was immune from suit and did not fall within the FSIA’s commercial activities exception.<sup>260</sup>

A dismissal ground that first manifested during this period was the statute of limitations (SOL). Under the TVPA, plaintiffs must sue for wrongs committed against them within ten years of the wrong.<sup>261</sup> The text of the ATS possesses no such restriction. Nevertheless, courts in some jurisdictions began to read the requirements of the TVPA or § 1983 (considered an analogous civil rights statute that the court in *Kadic* compared to the ATS) backward into the ATS and imported an SOL requirement there as well.<sup>262</sup> In particular, courts tended to apply the SOL in cases that had to do with wrongs committed far in the past, or at least relatively speaking. Courts dismissed claims related to the Vietnam War,<sup>263</sup> World War II,<sup>264</sup> and slavery in the United States.<sup>265</sup> Sometimes courts also justified these decisions on standing grounds—that is to say courts held

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255. *See supra* note 147.

256. *Smith*, 101 F.3d at 245. A similar argument was considered and rejected in a Holocaust suit brought in the D.C. Circuit, albeit not expressly on ATS grounds. *See Prinz v. Fed. Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994).

257. *Zhou v. Peng*, No. 00-Civ-6446, 2002 WL 1835608, at \*15 (S.D.N.Y. Aug. 8, 2002), *vacated in part*, 286 F. Supp. 2d 255 (S.D.N.Y. 2003).

258. *Zhou*, 286 F. Supp. 2d at 257.

259. *Id.*

260. *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000).

261. 28 U.S.C. § 1350 note § 2(c) (2012).

262. *See infra* notes 263–65.

263. *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004) (borrowing the SOL from the TVPA to dismiss claims by residents of a village in Vietnam against American soldiers).

264. *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir. 2003) (dismissing claims against German and Japanese corporations alleging that plaintiffs were forced into slavery during World War II); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 491 (D.N.J. 1999) (dismissing claim against motor company for forced labor during World War II and also holding that the exclusive remedy for such claims was government-to-government negotiations and the principle of comity).

265. *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1069–71 (N.D. Ill. 2004) (dismissing claims by formerly enslaved African-Americans or descendants of formerly enslaved African-Americans).

that the descendants of victims who suffered abuses were not injured in fact and therefore could not sue.<sup>266</sup> The remaining grounds for dismissal are not prominent enough to warrant addressing.

The rest of the cases resulted in either victories for the plaintiffs or settlements. These courts awarded the plaintiffs large sums of money: \$745 million and \$4.5 billion, respectively.<sup>267</sup> None of the money was collected.<sup>268</sup> In 1996, the Ninth Circuit affirmed the groundbreaking Marcos jury verdict after various aspects of the trial were challenged.<sup>269</sup> Marcos contested a jury instruction that the estate could be held liable if Marcos knew the military tortured, summarily executed, and “disappeared” the population “and failed to use his power to prevent it.”<sup>270</sup> The Ninth Circuit ruled that the principle that commanders could be held liable for the actions of their subordinates was well established under both U.S. and international law.<sup>271</sup> The judgment has yet to be collected.<sup>272</sup>

Four settlements were also reached, including the first non-Holocaust settlement against a corporation. Seventy-seven cases were brought against corporations during this time period, and all were dismissed as to the corporate defendants but *Doe I v. Reddy*.<sup>273</sup> In *Reddy*, a group of Indian immigrants, primarily young women, alleged that the Reddy family, which owned substantial real estate and ran various businesses in Northern California, promised them education and employment if they came to the United States; instead they were forced into involuntary servitude and sexually and physically abused.<sup>274</sup> The case, brought under the ATS for cruel and inhuman treatment against the Reddy family and the corporations they owned, settled for \$8.9 million in April 2004.<sup>275</sup> Before declining to dismiss the suit at the 12(b)(6) stage, the trial court rejected the defendants’ argument that the claims rested on unratified treaty obligations, instead concluding that *jus cogens* norms against slavery were sufficient to render the acts violations of the law of nations.<sup>276</sup> The court did not consider the issue of whether corporations could be held liable under the ATS, simply assuming this was the case.<sup>277</sup>

Two nondispositive opinions paved the way for corporate liability. First, in *Wiwa v. Royal Dutch Petroleum Co.*,<sup>278</sup> a court in the Southern District of New York held that businesses acting in tandem with a government, for

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266. See, e.g., *id.* at 1047–48.

267. See *supra* note 131.

268. See *supra* note 132.

269. *Hilao v. Estate of Marcos*, 103 F.3d 767, 771 (9th Cir. 1996).

270. *Id.* at 776–79.

271. *Id.* at 777.

272. See *Alvic & Nonato*, *supra* note 130, at S1.

273. No. 3:02-Civ-05570, 2003 WL 23893010 (N.D. Cal. Aug. 4, 2003).

274. *Id.*

275. *Doe I v. Reddy*, No. 3:02-cv-05570, slip op. at 2–7 (N.D. Cal. June 14, 2004) (discussing settlement reached on April 7, 2004).

276. *Reddy*, 2003 WL 23893010, at \*8.

277. *Id.*

278. No. 91-Civ-8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).



example through a conspiracy, could violate the law of nations and thereby be held accountable under the ATS.<sup>279</sup> Another opinion, issued by the Ninth Circuit in 2002, also bolstered support for the theory that corporations could be held liable under the ATS. On appeal in *Unocal*, the Ninth Circuit held that despite the fact that the oil company was a private actor, it could be held liable as a nongovernment entity for certain actions—such as torture, rape, and extrajudicial killings—because they were in furtherance of acts (in this case, slavery) that violated the law of nations and were actionable if committed by nonstate actors.<sup>280</sup> It also held that the oil giant could be held accountable for aiding and abetting the Myanmar military.<sup>281</sup> The Ninth Circuit deemed this holding consistent with *Tel-Oren* but vacated the opinion on settlement.<sup>282</sup>

The most important case of this period was unquestionably *Sosa*.<sup>283</sup> The Supreme Court held that norms recognized as falling under the law of nations must be as “well-established” as those “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” such as piracy, violations of safe conduct, and offenses against ambassadors.<sup>284</sup> Perhaps the most intriguing part of *Sosa*—which both foreshadowed and contradicted the Court’s ruling in *Kiobel II*—was Justice Breyer’s concurrence. While subscribing to the majority’s limitation on the law of nations, he wrote separately addressing principles of comity that undergird the ATS.<sup>285</sup> Universal jurisdiction, he suggested, is appropriate in certain instances involving purely foreign actors, for example when they commit genocide, war crimes, or torture and a *procedural* consensus exists such that these crimes could be tried anywhere in the world.<sup>286</sup> He implied, however, that holding foreign actors liable for actions outside the United States might be inconsistent with respect for the sovereignty of other states where the norms raise the possibility of conflicting with foreign laws.<sup>287</sup> He concluded that in *Sosa*’s case—where foreign actors arrested *Sosa* in another country—the lack of a *procedural* consensus around the illegality of the action “provide[d] additional support for the Court’s conclusion that the ATS [did] not recognize . . . underlying substantive claim[s] . . . outside the United States, of a citizen of one foreign country by another.”<sup>288</sup>

Properly read, *Sosa* is not isolationist. A better reading is that *Sosa* actively engages principles of international law, but does so in a conservative and cautious manner. *Sosa* actively proclaims that the ATS is

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279. *Id.* at \*1313. The case later settled in 2009.

280. *Unocal II*, 395 F.3d 932, 944–56 (9th Cir. 2002), *appeal dismissed per stipulation en banc*, 403 F.3d 708 (9th Cir. 2005).

281. *Id.* at 954–56.

282. *Id.* at 945.

283. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

284. *Id.* at 692, 694.

285. *Id.* at 761 (Breyer, J., concurring).

286. *Id.* at 761–62.

287. *Id.*

288. *Id.* at 763.

not “stillborn,” meaning that it permits a “claim for relief without a further statute expressly authorizing adoption of causes of action.”<sup>289</sup> The justices may have intended to narrow the type of actionable claims by cabining the definition of the law of nations. There are certainly many claims under treaties that courts do not recognize as creating such a norm, and *Sosa* did nothing to dispel, and in fact amplified, opposition to causes of actions based on treaties alone. *Sosa* merely insisted that claims brought under the ATS be *jus cogens* violations—namely violations with a strong international consensus against them.

#### D. From *Sosa* to *Kiobel* II

*Sosa*, in tandem with *Wiwa* and *Unocal*, ushered in a new era in ATS litigation—but not always in the manner currently understood. Scholars are right that this period was one of the hardest for ATS practitioners and reflected a narrower approach to certain doctrines.<sup>290</sup> Nevertheless, such narrowing did not prevent many positive developments for plaintiffs from taking place, including extremely large corporate settlements.

At least four notable trends manifested during this period. First, the prediction that *Sosa* would shake the ATS at its foundation proved false: the list of actionable claims actually expanded even though the overall dismissal rate was higher. And *Sosa* left untouched core causes of action, imposing only a requirement that the harm suffered must be factually severe enough to support one or more of them. A new, unstudied change in this doctrine in certain circuits, however, had to do with secondary liability. Plaintiffs depended on theories of secondary liability, such as aiding and abetting the state in its perpetration of human rights violations, to circumvent the rule that private actors cannot commit violations of the law of nations through extrajudicial killings and torture that would otherwise only qualify as wrongful death or assault. Certain courts now held that claims against corporations based on such theories must allege purpose instead of knowledge on the issue of intent.

Second, the hydraulics within the doctrine of sovereign immunity shifted. Courts began holding government officers—as opposed to agencies such as government banks—immune under the FSIA on the basis that they

289. *Id.* at 714.

290. See, e.g., Stephens, *supra* note 13, at 1511. During this period, over two and a half times more cases were resolved than from 1995 to 2004, for a total of 160, excluding frivolous and pro se cases. The massive increase in litigation is largely attributed to the rise of suits against corporations. Indeed, of these 160 suits, sixty-eight (42 percent) saw corporations as defendants. Comparable figures from earlier periods show a lower magnitude: for example, from 1995 through 2004 only twenty-seven suits against corporate defendants were resolved, and twenty-seven additional opinions were issued. But while more claims were brought, more claims were shunted. One hundred twenty-seven out of the 160 cases (79 percent) resolved in favor of defendants. Of the remaining cases, one motion to dismiss was denied, eleven default judgments were granted, five trials led to verdicts for the plaintiffs, and summary judgment was granted to the plaintiffs in the final case. Twelve cases settled. One case was a split decision for the plaintiff and defendant. The remaining cases had unknown outcomes or were dismissed voluntarily.

qualified as state instrumentalities. The Supreme Court rejected this approach in 2010 but left the door ajar for the application of common law immunity to state officials.<sup>291</sup>

Third, this period experienced a huge takeoff in the number of suits against corporations. Only two judgments—both default judgments—held a corporation liable under the ATS.<sup>292</sup> But this period saw a number of important settlements, including *Wiwa* and *Unocal*. Toward the end of the period, a debate emerged over whether a corporation could be considered a “person” under international law. There were also some developments in TVPA jurisprudence relating to the aiding and abetting question. Finally, of course, the Supreme Court handed down *Kiobel II*.

Based on *Sosa*’s narrowing of violations amounting to those under the law of nations, one would expect a narrower range of cases dismissed on this ground. One hypothesis is that claimants initially sued for breaches of commercial contract or fraud or other economic torts in the wake of *Filártiga*’s cryptic methodology of defining the law of nations, which lower courts struggled with for years. Prior to *Sosa*, the most successful claims tended to be Holocaust related (though some of these failed) or alleged genocide, war crimes, extrajudicial killing, disappearance, “official” torture, arbitrary detention, cruel, inhuman, and degrading treatment, or forced labor. After *Sosa*, the list broadened to include proxies of terrorist acts<sup>293</sup> and human experimentation.<sup>294</sup> On the other hand, claims dismissed post-*Sosa* include terrorism itself,<sup>295</sup> child custody,<sup>296</sup> slavery in the nineteenth century,<sup>297</sup> failure to compensate wartime destruction of property,<sup>298</sup> private

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291. *Samantar v. Yousuf*, 560 U.S. 305, 308, 324 (2010).

292. *See supra* note 123.

293. *See, e.g., Mwani v. Bin Ladin*, No. 99-Civ-125, 2006 WL 3422208, at \*4–5 (D.D.C. Sept. 28, 2006) (handing down default judgment to a class of five thousand Kenyans who were the victims of a terrorist attack on the U.S. embassy in Nairobi, because the act violated “the rights of ambassadors,” without questioning the plaintiffs’ standing to bring such claims).

294. *See, e.g., Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

295. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 127 (2d Cir. 2013) (dismissing claims under the ATS because terrorism was not an established violation of the law of nations and a TVPA claim because it was not committed under color of state law).

296. *See, e.g., Taveras v. Taveraz*, 477 F.3d 767, 776, 782 (6th Cir. 2007) (holding cross-border child abduction did not violate the law of nations, and considerations of comity with the Dominican Republic precluded suit).

297. *See, e.g., Hereros ex rel. Riruako v. Deutsche Afrika-Linien GmbH & Co.*, 232 F. App’x 90, 93–95 (3d Cir. 2007) (relying on *Sosa*’s definition of the law of nations to conclude that, despite the court’s inclination to view slavery from 1899 to 1915 as a violation of the law of nations, a “mere inclination” did not “support a cause of action in [its] reading of *Sosa*”).

298. *See, e.g., El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854–55 (D.C. Cir. 2010) (citing *Sosa* to dismiss a suit against the United States without addressing the question of sovereign immunity for bombing a pharmaceutical plant in Sudan in the mistaken belief that the plant supplied Al Qaeda and failing to provide compensation for such destruction).

torture,<sup>299</sup> and the use of toxic chemicals in areas with civilians, among others.<sup>300</sup>

Courts did dismiss claims post-*Sosa* that might have qualified as violations under the law of nations had they been “severe” enough. For example, in *Flomo v. Firestone Natural Rubber Co.*,<sup>301</sup> Judge Posner, writing for the Seventh Circuit, held that allegations of forced child labor on a Liberian rubber plantation “while bad, [were] not that bad” and therefore did not violate the law of nations.<sup>302</sup> This was because “[a]griculture is the sector with the most child labourers [sic] . . . [and] also the sector with the most potential for decent work for rural children and young adolescents who have reached the legal minimum age of employment.”<sup>303</sup> Additional cases ruled out what would have otherwise qualified as violations of the law of nations or torture or extrajudicial killing if the facts alleged had supported the claims.<sup>304</sup>

Another extremely important question that arose during this period was whether aiding and abetting governments in committing violations of the law of nations was actionable. Such aiding and abetting claims formed the basis for most corporate liability lawsuits: plaintiffs rarely alleged that corporations themselves committed acts of torture or extrajudicial killings, known as “direct liability,” because courts usually held such that customary international law only recognized torture and extrajudicial killing committed under color of law.<sup>305</sup> As a result, most victims of corporate human rights abuses alleged that corporations aided and abetted regimes in the country where the violation occurred. Courts were split on the degree of intent necessary for such aiding and abetting claims. For example, as the Ninth Circuit held in *Unocal*, the standard for aiding and abetting was “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”<sup>306</sup> Both the D.C. and Eleventh Circuits agreed the standard was “knowing.”<sup>307</sup> Other courts disagreed, holding a

299. See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1, 15–16 (D.C. Cir. 2009) (holding that claims that a private military contractor committed torture abroad did not violate the law of nations because the contractor was not acting under color of law, and therefore its actions merely constituted assault and battery).

300. See, e.g., *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 109 (2d Cir. 2008) (dismissing claim for wartime use of chemical that caused civilian deaths and injuries because its purpose was to destroy forests used to disguise the Viet Cong).

301. 643 F.3d 1013 (7th Cir. 2011).

302. *Id.* at 1023.

303. *Id.* at 1024 (basing this holding on a motion for judgment on the pleadings that was converted into a motion for summary judgment).

304. E.g., *Mohamed v. Holder*, No. 1:11-Civ-50, 2011 WL 3820711, at \*1 (E.D. Va. Aug. 26, 2011) (dismissing suit under TVPA because allegations of physical abuse did not amount to torture).

305. See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1, 15–16 (D.C. Cir. 2009).

306. *Unocal II*, 395 F.3d 932, 947 (9th Cir. 2002), *appeal dismissed per stipulation en banc*, 403 F.3d 708 (9th Cir. 2005).

307. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated*, 527 Fed. App’x 7 (D.C. Cir. 2013); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157–60 (11th Cir. 2005).

claim under the law of nations for aiding and abetting must allege purpose to constitute a violation of customary international law and, thereby, a violation of the law of nations as well.<sup>308</sup> In *Kiobel v. Royal Dutch Petroleum Co.*<sup>309</sup> (*Kiobel I*), Judge Pierre N. Leval concurred in the judgment, asserting that the degree of mens rea, based on customary international law under an aiding and abetting theory, must be purpose.<sup>310</sup>

Many other cases were dismissed on the ground of immunity doctrines, including sovereign immunity, diplomatic immunity, and head-of-state immunity. A few such actions were brought against governments despite *Amerada Hess*, though often these suits included state officials or other parties as defendants. Courts began to address whether state officers were immune under the FSIA or if the FSIA only applied to states and their instrumentalities. Some courts held—in tension with *Filártiga*—that state officers qualified as state instrumentalities when acting in their official capacities under “color of law” or that if the state “ratified” their actions, sovereign immunity applied.<sup>311</sup> Other courts, including those in the Second Circuit, reached similar conclusions—again in tension with *Filártiga*—on a common law basis.<sup>312</sup> Many of the cases were against an officer of a government allied with the United States—such as Israel—while officials of other countries did not receive this type of protection. In the Supreme Court’s third decision treating the ATS, the 2010 case *Samantar v. Yousuf*,<sup>313</sup> the Court unanimously rejected the FSIA argument but left the door open to the possibility that these officials might be protected by common law immunity.<sup>314</sup>

In certain ATS cases against U.S. officers, courts have held that the Westfall Act<sup>315</sup> allows the United States to substitute itself as the defendant when the acts in question occurred within the scope of an officer’s employment, thereby barring suit under the domestic law doctrine of

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308. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247–48 (2d Cir. 2009) (affirming the district court’s grant of summary judgment for a corporation that allegedly provided assistance to the government of Sudan in committing genocide and war crimes because the plaintiffs could not prove the company acted with the purpose of harming Sudanese citizens); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011) (adopting the Second Circuit’s reasoning).

309. 621 F.3d 111 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013).

310. *Id.* at 158 (Leval, J., concurring in the judgment).

311. *E.g.*, *Belhas v. Ya’alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008) (dismissing a suit against the head of Israeli Army Intelligence brought by victims of the Israeli bombing in Lebanon in which the State Department submitted a letter to the court).

312. *Matar v. Dichter*, 563 F.3d 9, 14–15 (2d Cir. 2009) (holding, in the context of another suit against an Israeli officer, that “in the common-law context, we defer to the Executive’s determination of the scope of immunity”).

313. 560 U.S. 305 (2010).

314. *Id.* at 308, 324.

315. Federal Employees Liability Reform and Tort Compensation (Westfall) Act, 28 U.S.C. § 2679 (2012) (allowing the United States to substitute itself as a defendant in most tort claims brought against government officers acting within the scope of their employment).

sovereign immunity.<sup>316</sup> Other courts recognized diplomatic immunity, even if diplomats were not committing crimes in their diplomatic capacity.<sup>317</sup> As in previous periods, sitting heads of state were immune even when the acts were committed prior to assuming their presidencies.<sup>318</sup>

Far less significant, grounds for dismissing lawsuits from *Sosa* to *Kiobel II* included personal jurisdiction (some for inadequate service of process and some for insufficient minimum contacts with the forum in question), forum non conveniens, the political question doctrine, the state secrets privilege, and preemption. Finally, this period witnessed the first pushback against corporate liability under the ATS. For a decade and a half, courts assumed corporate liability attached under the law of nations. The Second Circuit itself deemed corporations subject to the law of nations nine times prior to *Kiobel I*.<sup>319</sup> In *Kiobel I*, however, the Second Circuit changed course. In a 2-1 opinion, the majority found that while corporations are considered persons under domestic law, they are not persons under international law, and hence there is no jurisdiction over them under the statute.<sup>320</sup> The court held that the word “persons” must be interpreted under international law rather than domestic law, and because no successful suit had been brought against a corporation per se, despite the World War II Industrialist Cases, which held that the leaders of businesses that supported the Nazis could be criminally liable under international law,<sup>321</sup> no norm established liability.<sup>322</sup> Other circuits such as the Eleventh Circuit disagreed.<sup>323</sup>

With regard to the TVPA, there were several specific grounds for dismissal. First, courts held that its remedies did not apply retroactively.<sup>324</sup>

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316. See, e.g., *Sobitan v. Glud*, 589 F.3d 379, 388–89 (7th Cir. 2009) (holding that the Westfall Act applies to claims under the ATS that are brought pursuant to a treaty); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 34 (D.D.C. 2006) (holding that torture of suspected terrorists was within the scope of employment), *aff’d sub nom.* *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

317. See, e.g., *Devi v. Silva*, 861 F. Supp. 2d 135, 144 (S.D.N.Y. 2012) (dismissing suit against Sri Lankan military commander and diplomat allegedly responsible for the torture and killing of an ethnic minority population because the Diplomatic Relations Act entitles diplomats to immunity, notwithstanding the ATS and TVPA).

318. See, e.g., *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (dismissing suit brought by widows of former Presidents of Rwanda and Burundi against the current President of Rwanda for allegedly killing their husbands by shooting down their plane with a missile before taking office).

319. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 254 n.125 (S.D.N.Y. 2009) (collecting cases).

320. *Kiobel I*, 621 F.3d 111, 118–20 (2d Cir. 2010) (stating that the standard employed under the ATS must be that of customary international law and further finding that, under this standard, there is no norm, much less a universal one, to support corporate liability under the ATS), *aff’d on other grounds*, 133 S. Ct. 1659 (2013).

321. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477 (2001) (discussing post-World War II criminal prosecutions of the leaders of large German corporations for aiding slave labor and deportation).

322. *Kiobel I*, 621 F.3d at 131–42.

323. See, e.g., *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

324. See *Ditullio v. Boehm*, 662 F.3d 1091, 1099–100 (9th Cir. 2011).

Second, courts dismissed suits brought by persons other than the victim or on behalf of the victim (i.e., a “representative or administrator of [the victim’s] estate”)<sup>325</sup> despite the fact that the wording of the statute authorizes suits by “a claimant in an action for wrongful death.”<sup>326</sup> Additionally, many courts held that the TVPA did not protect victims from defendants who were not individuals, meaning it did not protect them from corporations, states, or nonstate entities even if these entities aided and abetted individuals in committing their acts under color of state law.<sup>327</sup> In 2012, the Supreme Court supported this conclusion in a case involving a victim allegedly tortured and killed at the hands of the PLO, ruling that the word “individual” as opposed to “person” used in the TVPA meant that private actors such as the PLO could not be held liable.<sup>328</sup>

Despite this doctrinal stiffening, plaintiffs prevailed in several cases under both the ATS and the TVPA—including two default judgments on the issue of human trafficking and forced labor that led to awards of \$13.5 million and \$7.6 million, respectively.<sup>329</sup> One of two standing judgments against corporations was handed down in 2008, before the Second Circuit’s *Kiobel I* decision holding that corporations could not be liable for violations of the law of nations. The complaint alleged that a U.S. forestry company induced numerous workers to come from Guatemala on the promise of H-2 visas and then confiscated their passports and made them work in harsh conditions without adequate health care or remuneration.<sup>330</sup> Other default judgments included a \$47 million victory against the former Honduran military intelligence chief for torture and disappearances,<sup>331</sup> a \$10 million award against an El Salvadorian former security chief who acted under color of law in assassinating an Archbishop while he was giving mass,<sup>332</sup> and a default judgment for approximately \$8.6 million on the basis of the kidnapping and arbitrary detention of the Acting President of the American University of Beirut by Hezbollah.<sup>333</sup> In addition, TVPA claims contributed to summary judgment for hundreds of millions of dollars for the 1989 bombing of a flight from Brazzaville, Congo, to Paris by Libyan

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325. *Fisher v. Great Socialist People’s Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46, 54–55 n.10 (D.D.C. 2008).

326. 28 U.S.C. § 1350 note § 2(a)(2) (2012).

327. *See, e.g., Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1128 (9th Cir. 2010) (dismissing TVPA claims against oil company for allegedly paying the Nigerian military to attack victims on an offshore platform).

328. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709–10 (2012).

329. *Magnifico v. Villanueva*, No. 10-Civ-80771, 2012 WL 5395026, at \*1 (S.D. Fla. Nov. 2, 2012) (awarding judgment in case alleging causes of action under RICO, the TVPA, the FLSA, and state law, in addition to the ATS and TVPA); *Aguilar v. Imperial Nurseries*, No. 07-Civ-00193, 2008 WL 2572250, at \*1–2 (D. Conn. May 28, 2008) (granting default judgment).

330. Complaint at 182–89, 257–64, *Aguilar*, 2007 WL 1183549 (elaborating facts alleged against the company).

331. *Reyes v. Grijalba*, 02-cv-22046 (S.D. Fla. Mar. 31, 2006).

332. *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1122 (E.D. Cal. 2004).

333. *Dodge v. Islamic Republic of Iran*, No. 03-Civ-252, 2004 WL 5353873, at \*5 (D.D.C. Aug. 25, 2004) (assigning damages not only under the TVPA, but also under the Flatow Amendment with jurisdiction arising under the FSIA).

officials that killed all 170 passengers, including seven U.S. citizens, despite the fact that certain courts had held the application of the TVPA was not retroactive.<sup>334</sup> Jury trials also resulted in verdicts for plaintiffs, including in a case for torture and extrajudicial killing by El Salvadorian soldiers,<sup>335</sup> and in a case for arbitrary detention and extrajudicial killing of an economist appointed by Chilean President Salvador Allende who was overthrown in a military coup d'état.<sup>336</sup>

Twelve cases also settled, including seven against corporations, the most important of which are *Unocal* and *Wiwa*. *Unocal* settled in 2005 for \$30 million before the case could be reheard en banc and before Unocal's merger with Chevron.<sup>337</sup> *Wiwa* finally settled in 2009 for \$15.5 million.<sup>338</sup> The four other settlements against corporations included two cases against security contractors in Iraq brought under the ATS, another brought under the TVPA,<sup>339</sup> and a case against Yahoo! for allegedly giving the Chinese government access to emails of political dissidents who were subsequently arbitrarily arrested, tortured, and subjected to cruel, inhuman, and degrading treatment.<sup>340</sup>

After the Second Circuit in *Kiobel I* held that corporations were not persons under customary international law and therefore could not be liable under the ATS, the Supreme Court granted certiorari on this question.<sup>341</sup> After oral argument, the Court placed the case back on the calendar and instructed the parties to brief "whether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."<sup>342</sup> This move was unexpected, but not entirely so. After *Kiobel I*, the Ninth Circuit, sitting en banc, rejected the defendants' identical argument in *Sarei v. Rio Tinto, PLC*.<sup>343</sup> Judge

334. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, No. 02-Civ-02026, 2006 WL 2384915, at \*9 (D.D.C. May 11, 2006).

335. *Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir. 2009) (upholding jury verdict awarding \$6 million).

336. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151–52 (11th Cir. 2005) (upholding verdict). The jury awarded Cabello's survivors \$3 million in compensatory damages and \$1 million in punitive damages. *Id.*

337. Goldhaber, *supra* note 11, at 129.

338. *Id.* at 128.

339. *Manook v. Unity Res. Grp.*, No. 10-01970 (4th Cir. Mar. 16, 2011) (dismissing appeal pursuant to a voluntary stipulation by the plaintiff); *In re XE Servs. Alien Tort Litig.*, Nos. 1:09-cv-615, 1:09-cv-616, 1:09-cv-617, 1:09-cv-618, 1:09-cv-645 (E.D. Va. Jan. 6, 2010) (approving confidential settlement agreement).

340. *Xiaoning v. Yahoo!*, No. 4:07-cv-02151 (N.D. Cal. Nov. 28, 2007) (dismissing case pursuant to settlement).

341. Petition for a Writ of Certiorari at i, *Kiobel II*, 133 S. Ct. 1659 (2013) (No. 10-1491) (phrasing the question in terms of corporate immunity); Order Granting Writ in Tandem with *Mohamad v. Rajoub*, *Kiobel II*, 133 S. Ct. 1659 (No. 10-1491).

342. Order Restoring the Case to the Calendar for Reargument and Directing the Parties to File Supplemental Briefs, *Kiobel II*, 133 S. Ct. 1659 (No. 10-1491).

343. 671 F.3d 736 (9th Cir. 2011), *cert. granted, judgment vacated*, 133 S. Ct. 1995 (20013); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 20 (D.C. Cir. 2011) ("[W]e hold that there is no extraterritoriality bar.").



Kleinfeld, joined by Judges Bea and Ikuta, dissented.<sup>344</sup> Judge Kleinfeld argued that the text or context of a statute must clearly indicate it has extraterritorial application for jurisdiction to attach based on the Supreme Court's recent securities jurisprudence.<sup>345</sup> The ATS met neither criterion, he argued, on the facts of a "foreign cubed" case.<sup>346</sup> Judge Kleinfeld described the majority's logic as "a new imperialism, entitling our court[s], and not the peoples of other countries, to make the law governing persons within those countries" that "now asserts entitlement to make law for all the peoples of the entire planet."<sup>347</sup> Nevertheless, at the time the Supreme Court ordered reargument in *Kiobel II*, no court had ruled that the ATS lacked extraterritorial application. The Supreme Court unanimously affirmed the Second Circuit on this basis on April 17, 2013.<sup>348</sup>

#### E. From *Kiobel II* to the Present

Only two and a half years have transpired since *Kiobel II*. As a result, it is impossible to make predictions as to how cases will play out in the long run without some degree of speculation. What can be said is that, despite prognostications that the ATS is dead and that the presumption against extraterritoriality has eliminated any chance of plaintiffs' prevailing, this has not proved true thus far. Though the predominant means of dismissing cases is now the presumption, many of these cases might not have succeeded anyway for other reasons, such as an inability to plead purpose in aiding and abetting suits against corporations or the gravity of the harms alleged. And many lower courts have taken pains to follow Justice Breyer's concurrence in *Kiobel II* and interpreted the presumption narrowly, holding that exceptions apply when part of the tort has been committed on U.S. soil.<sup>349</sup> That said, fewer ATS and TVPA cases have been filed since *Kiobel II* than in previous periods,<sup>350</sup> suggesting the precedent has deterred

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344. 671 F.3d at 797–818 (Kleinfeld, J., dissenting).

345. *Id.* at 803–11 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), a securities case, in support of the presumption).

346. *Id.* at 809–11.

347. *Id.* at 798.

348. *Kiobel II*, 133 S. Ct. 1659, 1663 (2013).

349. *See, e.g.*, *Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (holding defendant liable in an action for default judgment for a truck bomb that exploded at the U.S. embassy in Kenya on the ground that the embassy had a sufficient nexus to the United States); *Ahmed v. Magan*, 2:10-Civ-00342, 2013 WL 4479077, at \*7 (S.D. Ohio Aug. 20, 2013) (holding that a U.S. citizen who aided and abetted the Somali national security service in torturing and committing cruel, inhuman, and degrading treatment against the plaintiff was liable in a default judgment action), *aff'd*, 2013 WL 5493032, at \*1 (S.D. Ohio Oct. 2, 2013) (awarding \$5,000,000 in compensatory damages and \$10,000,000 in punitive damages).

350. The prevailing wisdom as of April 2014 was that no such cases were filed post-*Kiobel II*. *See* JOHN BELLINGER III & REEVES ANDERSON, U.S. CHAMBER INST. FOR LEGAL REFORM, AS *KIOBEL* TURNS ONE, ITS EFFECT REMAINS UNCLEAR (2014), [http://www.instituteforlegalreform.com/uploads/sites/1/Kiobel\\_Anniversary\\_Paper\\_April\\_29\\_2014\\_.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Kiobel_Anniversary_Paper_April_29_2014_.pdf) [<http://perma.cc/C46F-LVXG>]. This is untrue, as can be seen from the following string cite that captures all ATS and ATS/TVPA cases filed since *Kiobel II* by doing a data scrap from Bloomberg, where I searched for the section of the U.S. Code in which the ATS resides. *See* *Brill v. Chevron Corp.*, No. 3:15-cv-04916 (N.D. Cal. Oct. 26, 2015); *Dogan v. Barak*, No.

plaintiffs from pursuing human rights claims under the statute despite chances of prevailing if the suit is strong in other respects. In addition, courts have held that *Kiobel II* leaves the TVPA untouched and that the TVPA displaces the presumption against extraterritoriality.<sup>351</sup>

As of the date of this Article, sixty ATS and TVPA cases since *Kiobel II* had been fully resolved, with many additional pending cases. Of the fully resolved cases, forty-two (70 percent) were dismissed on a motion to dismiss,<sup>352</sup> and defendants currently have an 86 percent win rate—the highest of any period, but specifically high due to voluntary dismissals.<sup>353</sup> The high level of voluntary dismissals perhaps suggests that plaintiffs are being deterred from pursuing cases under the ATS, and indeed newly filed cases appear to originate from unseasoned lawyers from the plaintiffs' bar who lack familiarity with the intricacies of the statute.

The presumption against extraterritoriality was by far the most prominent ground invoked in dismissing these cases. Sixteen of the forty motions to dismiss in favor of the defendant (40 percent) were felled by the presumption, though many of the dismissals involved other grounds as well.<sup>354</sup> Many of the cases dismissed under the presumption were “foreign cubed” cases, i.e., cases in which the plaintiff was an alien, the defendant was foreign, and the tort occurred outside of the territory of the United States. For example, a court in the District of Columbia dismissed a complaint alleging that Iranian banks funded a terrorist group responsible

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2:15-cv-08130 (C.D. Cal. Oct. 16, 2015); *Salim v. Mitchell*, No. 2:15-cv-00286 (E.D. Wash. Oct. 13, 2015); *Dalziel v. Malaysia Airlines*, No. 1:15-cv-06202 (N.D. Ill. July 15, 2015); *You v. Japan*, No. 4:15-cv-03257 (N.D. Cal. July 13, 2015); *Singh v. Manjit Singh G.K.*, No. 1:15-cv-05372 (S.D.N.Y. July 10, 2015); *Ali Jaber v. United States*, No. 1:15-cv-00840 (D.D.C. June 7, 2015); *Ladra v. Rubias*, No. 1:15-cv-04231 (S.D.N.Y. June 2, 2015); *Alarcon v. Holloway*, No. 1:15-cv-03095 (E.D.N.Y. May 28, 2015); *Sikhs for Justice Inc. v. Bachchan*, No. 2:14-cv-08297 (C.D. Cal. Oct. 27, 2014); *Am. Justice Ctr., Inc. v. Modi*, No. 1:14-cv-07780 (S.D.N.Y. Sept. 25, 2014); *Klayman v. Obama*, No. 1:14-cv-01484 (D.D.C. Aug. 28, 2014); *Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. Aug. 27, 2014); *Sauter v. Citigroup*, No. 1:14-cv-05812 (S.D.N.Y. July 29, 2014); *Jawad v. Hagel*, No. 1:14-cv-00811 (D.D.C. May 15, 2014); *Doe No. 117 v. Singer*, No. 2:14-cv-03530 (C.D. Cal. May 7, 2014); *Gonzalez v. S. Sioux City Police Dep't*, No. 4:14-cv-03089 (D. Neb. May 1, 2014); *Doe v. Pure Forest, LLC*, No. 2:14-cv-00879 (E.D. Cal. Apr. 8, 2014); *William v. AES Corp.*, No. 1:14-cv-00343 (E.D. Va. Apr. 2, 2014); *Tawfik v. Al-Sabah*, No. 13 Civ. 4923 (S.D.N.Y. Dec. 17, 2013); *Jara v. Barrientos Nunez*, No. 3:13-cv-01075 (M.D. Fla. Sept. 4, 2013); *Sikhs for Justice Inc. v. Gandhi*, No. 1:13-cv-04920 (E.D.N.Y. Sept. 3, 2013); *Sun v. China Petroleum & Chem. Corp.*, No. 2:13-cv-05355 (C.D. Cal. July 24, 2013); *Sikhs for Justice v. Badal*, No. 1:13-cv-04418 (S.D.N.Y. June 25, 2013); *Delgado v. Villanueva*, No. 1:13-cv-22259 (S.D. Fla. June 25, 2013); *Quintero Perez v. United States*, No. 3:13-cv-01417 (S.D. Cal. June 17, 2013); *Ahmad v. Found. for Int'l Res. & Ed.*, No. 1:13-cv-03376 (S.D.N.Y. May 17, 2013).

351. *See, e.g.*, *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 602 (11th Cir. 2015).

352. *See supra* note 37.

353. One default judgment was denied and one was reversed, one jury trial for the plaintiff was reversed, one motion for summary judgment on the part of the defendant was granted, two cases were dismissed sua sponte, and six groups of plaintiffs voluntarily dismissed their ATS claims, though one of the last may have settled. Two other cases settled, which I do not count as victories for the defendant.

354. *See supra* Part II.D; *supra* Table 1.

for the death of civilians in Israel on this basis that the action had no ties whatsoever to the United States.<sup>355</sup>

Many among the plaintiffs' bar had hoped that courts would be reluctant to dismiss "foreign squared" cases—cases in which the defendant is a U.S. citizen—but many such claims have been dismissed, or have at least stipulated that U.S. citizenship alone is not dispositive.<sup>356</sup> For example, in *Mujica v. AirScan Inc.*,<sup>357</sup> the plaintiffs alleged that the defendants—both U.S. citizens—had "aided and abetted and conspired" with the Colombian Air Force in bombing near an oil pipeline to kill insurgents but instead killed numerous innocent civilians.<sup>358</sup> The court affirmed the dismissal of the case, stating that these allegations were based on "speculation" not "*factual matter*, accepted as true" and refused to grant the plaintiffs leave to amend.<sup>359</sup> Judge Zilly, sitting by designation, dissented in part.<sup>360</sup> He quoted Justice Breyer's concurrence in *Kiobel II* for the proposition that "[m]any countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad."<sup>361</sup> Judge Zilly would have held that nationality of the defendant was enough to confer subject matter jurisdiction even where no underlying conduct occurred in the United States.<sup>362</sup> Had the *Mujica* plaintiffs made specific allegations that met the *Iqbal* pleading standard without having had the benefit of discovery, it is unclear how the Ninth Circuit would have ruled.

Courts have also considered whether a U.S. citizen's actions in the United States—such as planning or financing—create a sufficient nexus to displace the presumption of extraterritoriality. Most starkly, in *Balintulo v. Daimler AG*,<sup>363</sup> the Second Circuit initially rejected the argument adopted by the Breyer concurrence and found that "violations of the law of nations occurring within the territory of a sovereign other than the United States" are not actionable "in *all* cases."<sup>364</sup> It dismissed the plaintiffs' arguments that U.S. corporations' provision of goods to the South African government after apartheid "tie[d] the relevant human rights violations to actions taken within the United States" and that the corporations could not be "*vicariously liable* for that conduct under the ATS."<sup>365</sup>

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355. *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185, 205 (D.D.C. 2013).

356. *Drummond*, 782 F.3d at 595 ("We find that the citizenship or corporate status of the defendants can guide us in our navigation of the touch and concern inquiry even though it does not firmly secure our jurisdiction.").

357. 771 F.3d 580 (9th Cir. 2014).

358. *Id.* at 584–85, 592.

359. *Id.* at 592.

360. *Id.* at 615–23 (Zilly, J., concurring in part and dissenting in part).

361. *Id.* at 618 (quoting *Kiobel II*, 133 S. Ct. 1659, 1675 (2013) (Breyer J., concurring)).

362. *Id.* at 617.

363. 727 F.3d 174 (2d Cir. 2013).

364. *Id.* at 189–92.

365. *Id.* at 188 (denying the defendants' writ of mandamus and remanding to the district court so the defendants could "seek the dismissal of all of the plaintiffs' claims, and prevail, prior to discovery, through a motion for judgment on the pleadings"). On remand, the district court ruled that any amendments to the complaint would be futile because the

Yet some cases might be able to sufficiently allege a nexus if they involved “much greater contact with the United States government, military, citizens, and territory.”<sup>366</sup> The best hope for ATS plaintiffs lies in the Fourth Circuit’s decision in *Al Shimari v. CACI Premier Technology, Inc.*<sup>367</sup> *Al Shimari* dealt with a Virginia-based private security contractor, CACI, and its involvement in Abu Ghraib.<sup>368</sup> It treated the company’s interrogators and the “sadistic, blatant, and wanton criminal abuses [they] inflicted on several detainees,” which included being “‘repeatedly beaten,’ ‘shot in the leg,’ ‘repeatedly shot in the head with a taser gun,’ ‘subjected to mock execution,’ ‘threatened with unleashed dogs,’ ‘stripped naked,’ ‘kept in a cage,’ ‘beaten on [the] genitals with a stick,’ ‘forcibly subjected to sexual acts,’ and ‘forced to watch’ the ‘rape[ ] [of] a female detainee.’”<sup>369</sup> According to the plaintiffs, CACI “failed to hire suitable interrogators, insufficiently supervised CACI employees, ignored reports of abuse, and attempted to ‘cover up’ the misconduct.”<sup>370</sup> The Fourth Circuit held that the phrase “relevant conduct” used by the Supreme Court in *Kiobel II* was not coextensive with the term “claims.”<sup>371</sup> In this case the claims had a sufficient nexus because they “allege[d] acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia,” “[t]he alleged torture occurred at a military facility operated by United States government personnel,” “the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior . . . [that] required CACI interrogators . . . to obtain security clearances from the United States Department of Defense,” and, most importantly, “allege[d] that CACI’s managers located in the United States were aware of reports of misconduct abroad, attempted to ‘cover up’ the misconduct, and ‘implicitly, if not expressly, encouraged’ it.”<sup>372</sup>

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defendants could not establish a sufficient nexus to the United States as the “relevant conduct”—namely the defendants’ financial support of apartheid—did not support jurisdiction because the actions in question were committed by their South African subsidiaries. *In re S. African Apartheid Litig.*, 56 F. Supp. 3d 331, 338 (S.D.N.Y. 2014). The Second Circuit affirmed, holding that, in fact, IBM’s design of products used by the South African regime did “touch and concern” the United States but there were insufficient allegations of purpose to meet the aiding and abetting requirement. *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015).

366. *In re S. African Apartheid Litig.*, 56 F. Supp. at 338.

367. 758 F.3d 516 (4th Cir. 2014). Note that the case was remanded to the lower court, where it was dismissed on the basis that the U.S. military was so intertwined with the contractors that the case was a nonjusticiable political question. See *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-Civ-00827, 2015 WL 4740217, at \*9 (E.D. Va. June 18, 2015). The case is currently on appeal with respect to this holding.

368. *Al Shimari*, 758 F.3d at 520.

369. *Id.* at 521.

370. *Id.* at 522.

371. *Id.* at 527.

372. *Id.* at 528–29.

Nevertheless, even if plaintiffs successfully allege contact between the United States and the claim, they may face heightened evidentiary burdens as they progress to summary judgment or if the court conducts jurisdictional discovery. For example, in *Doe v. Drummond Co.*,<sup>373</sup> the court treated the coal giant's alleged direct and indirect payments to the Colombian terrorist group Autodefensas Unidas de Colombia (AUC) to provide "security" for the company's operations and was "fully aware" of the group's terrorist designation.<sup>374</sup> The "arrangement" between Drummond and AUC, which was nominally to eliminate guerilla groups that threatened the mines, allegedly resulted in war crimes, extrajudicial killings, and crimes against humanity.<sup>375</sup> On a motion for summary judgment, the Eleventh Circuit held that the plaintiff's evidence of "general" contacts between Drummond and AUC—which included testimony that Drummond's president and other Drummond employees "consent[ed]" to fund the AUC and even to the murders themselves—was insufficient to overcome the presumption.<sup>376</sup> The court held that more specific evidence that the company's actions were "directed at" the violations was required to displace the presumption.<sup>377</sup> *Drummond* suggests that, at least in the Eleventh Circuit, the defendant's intent is a factor in considering the presumption despite the court's explicit statement that the standard for aiding and abetting is knowledge.<sup>378</sup>

Indeed, even as the presumption takes center stage, a debate still rages over the intent requirement to aid, abet, or conspire under the law of nations. The Second Circuit recently ratcheted up the evidentiary requirement for the touch and concern test, but also sub silencio left the door ajar for aiding and abetting claims based entirely on relevant *aiding and abetting* conduct that occurs *in the territorial bounds of the United States*. In *Mastafa v. Chevron Corp.*,<sup>379</sup> the Second Circuit held that it lacked subject matter jurisdiction over allegations that the U.S.-based oil company enabled the government of Saddam Hussein by paying the regime kickbacks that financed the torture and killing of innocent Iraqis.<sup>380</sup> First, the relevant conduct, namely "conduct [that] constitutes a violation of the law of nations or aiding and abetting such a violation," must touch and concern the United States to displace the presumption of extraterritoriality.<sup>381</sup> Second, the court imposed a new requirement: the court must "glimpse" the merits of the aiding and abetting allegation, going beyond the *Iqbal* pleading standard "[w]here a complaint alleges domestic conduct of the defendant" and dismiss the complaint for lack of subject matter jurisdiction if it does not touch and concern the United States with

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373. 782 F.3d 576 (11th Cir. 2015).

374. *Id.* at 580–81.

375. *Id.* at 579–80.

376. *Id.* at 599.

377. *Id.*

378. *Id.* at 609 ("Accordingly, as reflected in our controlling precedent, the appropriate standard for aiding and abetting liability is knowing substantial assistance.").

379. 770 F.3d 170 (2d Cir. 2014).

380. *Id.* at 174–76.

381. *Id.* at 186.

sufficient force to displace the presumption.<sup>382</sup> The panel also held that the citizenship of the defendant did not matter—only whether the actions, in this case the aiding and abetting, occurred in the United States.<sup>383</sup> The panel went on to hold that the conduct here—i.e., Chevron’s alleged financing of the Hussein dictatorship and the recoupment of oil in its stead—*had* occurred in the United States and therefore *met* the extraterritoriality requirement.<sup>384</sup> The relevant inquiry was whether the conduct that touched and concerned the United States was the same conduct that allegedly violated the law of nations, which can include aiding and abetting.<sup>385</sup> Nevertheless, the court concluded that the complaint in *Mastafa* must be dismissed because Chevron did not possess the *purpose* to aid and abet the human rights violations committed by the regime, only *knowledge* of such violations.<sup>386</sup>

With regard to sovereign immunity and other doctrines used to dismiss cases during this period, there were deviations from prior decisions. Perhaps the one exception was the application of common law sovereign immunity to two former Pakistani officials linked to a terrorist bombing in Mumbai.<sup>387</sup> There, a Second Circuit panel followed the executive’s exhortations to grant immunity on the basis that a finding of liability would jeopardize relationships in the region.<sup>388</sup> Other dismissal doctrines did not materially change from their previous contours, with the possible exception of personal jurisdiction, which, pursuant to the 2014 decision *Daimler AG v. Bauman*,<sup>389</sup> required plaintiffs to have specific contacts to the forum state if the claim relied on a foreign company’s subsidiary.<sup>390</sup>

#### CONCLUSION

Courts in the United States may be increasingly difficult places to pursue human rights claims. Indeed, they may not be the best, or the least bad, fora to litigate such suits given the lack of enforcement with respect to judgments and the high dismissal rate. Yet all is not lost. The data show that human rights suits are modest, but less so than believed. On the one hand, it is true that suits against individuals produced almost no enforceable judgments. On the other hand, suits against corporations have proven lucrative. And the fact that the number of dismissals of these suits has remained relatively static, hovering around 65 to 80 percent, suggests that explanations of a growing hostility toward international law driving dismissals are misplaced. At the very least, plaintiffs have the ability to plead around them as they have mutated not only the types of claims they

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382. *Id.*

383. *Id.* at 188.

384. *Id.* at 189–91.

385. *Id.* at 187.

386. *Id.* at 191–94.

387. *Rosenberg v. Pasha*, 577 Fed. App’x 22 (2d Cir. 2014).

388. *Id.* at 24.

389. 134 S. Ct. 746 (2014).

390. *Krishanti v. Rajaratnam*, 2014 WL 1669873, at \*6 (D.N.J. Apr. 28, 2014).

bring, but also the parties against which they bring them and the theories of liability they rely on, such as the rise of cases alleging aiding and abetting.

It is true that the presumption of extraterritoriality has become the dominant mode of disposing cases post-*Kiobel II*. The rise of the presumption does evince a degree of isolationism—the idea that U.S. law should not apply to govern the world. Though nominally the case is premised on statutory interpretation and the legislative history of the ATS, it is difficult to state with a straight face that this was the “reason” the Court overturned the entire line of ATS jurisprudence since *Filártiga* and the universal consensus that the ATS applied to cases involving actions committed abroad by foreigners. More likely, the case was premised on the increasing prominence of the ATS and a reluctance to use the ATS as capaciously as it was previously deployed. Yet, Justice Breyer’s *Kiobel II* concurrence combined with Justice Kennedy’s opinion suggests there is still hope—and possibly a majority of the Justices—who believe that *jus cogens* violations committed abroad can be litigated under the ATS if not through other means.

Given the grounds under which ATS suits have been dismissed, a core group of essential cases has emerged. These cases involve egregious harms—typically harms like torture or extrajudicial killing—and they have a connection to the United States, however slim. For example, in the *Marcos* case, the family was exiled in Hawai’i.<sup>391</sup> The defendant in *Filártiga* was domiciled in Brooklyn when proceedings were initiated.<sup>392</sup> This may be enough of a nexus to the United States to displace the presumption.<sup>393</sup> *Unocal* also would likely fall in this category—assuming it could meet the aiding intent standard. As ATS doctrines have shifted and witnessed the growth of suits against corporations—indeed the least modest aspect of the ATS—plaintiffs’ attorneys may adapt and bring cases against these types defendants just as plaintiffs’ attorneys adapted to changes in ATS doctrines over the past five periods. There are not enough data post-*Kiobel II* to make a solid prediction as to whether such settlements will continue, but the pushback by lower courts and evident sympathy toward plaintiffs’ plights suggests it is premature to say that the ATS or TVPA are dead. It is unlikely that these suits are a panacea to human rights violations—but then again, they never have been.

The best hope lies in creative, factually rigorous pleading and careful case selection. It may also lie in developing other transnational doctrines to buttress against the presumption. For example, a recent collaborative effort between human rights attorneys in Washington, D.C., and Nigerian lawyers under another obscure federal statute, the Foreign Legal Assistance Act,<sup>394</sup>

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391. See *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 495 (9th Cir. 1992).

392. *Filártiga v. Peña-Irala*, 630 F.2d 876, 878–80 (2d Cir. 1980).

393. This is not a viable argument, unfortunately, in the Second Circuit. *Sikhs for Justice, Inc. v. Nath*, 596 Fed. App’x 7, 10 (2d Cir. 2014) (holding that presence of Indian politicians in the United States was insufficient to displace the presumption).

394. 28 U.S.C. § 1782 (2012).

enabled plaintiffs who had suffered harm through Chevron's gas flaring in Nigeria to secure evidence of Chevron's operations in the United States, which they then provided to the Nigerian lawyers. The case—which likely would not even have been actionable under the ATS—settled.<sup>395</sup> *Kiobel II* may indicate hostility at the Supreme Court level, but lower courts have their doors open to these techniques, and the data speak to the fundamental resilience of transnational human rights.

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395. Rich Herz, *Chevron Settles with Nigerian Villagers Seeking Information on Gas Flaring Harms*, EARTHRIGHTS INT'L (June 16, 2014), <http://www.earthrights.org/media/chevron-settles-nigerian-villagers-seeking-information-gas-flaring-harms> [<http://perma.cc/2VEF-DPC7>].